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No. 92——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA,
Petitioner,

v.

MICHAEL M. BAYLSON, JAMES J. WEST, and
THOMAS W. CORBETT, JR.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court is prohibited from promulgating local rules pertaining to the service of subpoenas on attorneys solely because such rules are not expressly authorized by the Federal Rules of Criminal Procedure and are not "matters of detail" pertaining to court administration?

2. Whether a State ethics rule regulating the conduct of attorneys in serving subpoenas upon other attorneys is preempted by federal law under the Supremacy Clause insofar as it is applicable to federal prosecutors simply because it is arguably incompatible, although not actually in conflict, with federal law or whether instead the State's ethics rule deserves more deference because it arises from a substantial and compelling State interest in regulating the conduct of attorneys?

3. Whether a local federal district court rule or a State ethics rule which requires prosecutors to obtain prior judicial approval of subpoenas compelling attorneys to testify about past or present clients may be enforced against federal prosecutors practicing in the federal district courts of that State?

PARTIES TO THE PROCEEDINGS BELOW

The Disciplinary Board of the Supreme Court of Pennsylvania petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming an order of the United States District Court for the Eastern District of Pennsylvania. Respondents are Michael M. Baylson, James J. West, and Thomas W. Corbett, Jr., who are members of the Pennsylvania bar and the United States Attorneys for the Eastern, Middle, and Western Districts of Pennsylvania, respectively.*

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* By stipulation of counsel approved by the district court on March 6, 1990, Thomas W. Corbett, Jr., the current United States Attorney for the Western District of Pennsylvania, was substituted as a party plaintiff in place of Charles D. Sheehy, the acting United States Attorney for that district at the time suit was filed. *See also* Note 7, *infra*.

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IN THE

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THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA,
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JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1992.

Jurisdiction in this Court is established by 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 975 F.2d 102, is set forth at A. 1a-20a,[1] as amended on September 21, 1992. The opinion of the District Court, reported at 764 F. Supp. 328, is set forth at A. 23a-62a.

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[1] References to "A." are to the appendix to this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTORY AND OTHER PROVISIONS INVOLVED

28 U.S.C. § 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

Federal Rule of Criminal Procedure 57 and Federal Rule of Civil Procedure 83. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

Federal Rule of Criminal Procedure 17. Subpoena.

(a) For Attendance of Witnesses; Form; Issuance.

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before that magistrate, but it need not be under the seal of the court.

. . . . .

(c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

. . . . .

Eastern District of Pennsylvania Local Rule 14(IV)(B)

The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state. . . .

Middle District of Pennsylvania Local Rule 304.2

The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania . . . as amended from time to time by that court, unless specifically excepted in this court's rules.

Western District of Pennsylvania Local Rule 22(I)(B)

The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by the state court, except . . . as otherwise provided by specific order of this court.

Rule 3.10 of the Rules of Professional Conduct of the Supreme Court of Pennsylvania

A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.

STATEMENT OF THE CASE

A. Statement of Facts

This case involves Rule 3.10 of the Pennsylvania Rules of Professional Conduct, which requires prosecutors to obtain judicial approval before serving a subpoena upon an attorney which seeks to compel the attorney to provide evidence about a present or former client. Pursuant to Article V, Section 10(c) of the Constitution of the Commonwealth of Pennsylvania,[2] the Pennsylvania Su-

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[2] Article V, Section 10(c) invests the Supreme Court of Pennsylvania with "the power to prescribe general rules governing prac-

preme Court has promulgated the Pennsylvania Rules of Professional Conduct to regulate the behavior of attorneys belonging to the Pennsylvania bar and established petitioner, the Disciplinary Board of the Supreme Court of Pennsylvania, to enforce those rules. *See* Pa. Rule of Disciplinary Enforcement ("R.D.E.") 205.[3]

In response to a growing concern within the Pennsylvania bar about the ethical propriety of prosecutors serving grand jury subpoenas on attorneys to obtain evidence against the attorneys' clients, the Supreme Court of Pennsylvania adopted Rule 3.10 of the Pennsylvania Rules of Professional Conduct on November 7, 1988, providing:

> A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.[4]

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tice, procedure and the conduct of all courts . . . and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch. . . ."

[3] The Disciplinary Board is a fourteen member body appointed by the Pennsylvania Supreme Court and charged with investigating and reviewing allegations of attorney misconduct. *See* Pa. R.D.E. 102, 201, 205, 208. The Board is empowered to administer private reprimands to attorneys for inappropriate behavior; however, formal charges of attorney misconduct that might result in disbarment, suspension, public censure, or probation are forwarded by the Disciplinary Board to the Pennsylvania Supreme Court for its *de novo* review and final disposition. *See* Pa. R.D.E. 204, 208.

[4] The Comment to Rule 3.10 states:

> It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6, the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding;

Before Rule 3.10 was passed, the federal district courts for the Eastern, Middle, and Western districts of Pennsylvania had each promulgated local rules adopting the Rules of Professional Conduct of the Supreme Court of Pennsylvania, as amended from time to time, as the ethical rules governing attorneys admitted to practice before those courts. *See* E.D. Pa. Local Rule 14(IV)(B); M.D. Pa. Local Rule 304.2; W.D. Pa. Local Rule 22 (I)(B). Accordingly, when the Supreme Court of Pennsylvania adopted Rule 3.10 in 1988, it was automatically incorporated into the ethical rules governing attorneys practicing before the Pennsylvania federal district courts.[5]

On July 19, 1989, respondents Michael M. Baylson, James J. West, and Thomas W. Corbett, Jr., (*see* Note *, *supra*), who are members of the Pennsylvania bar and the United States Attorneys for the Eastern, Middle, and Western Districts of Pennsylvania respectively, brought suit in the United States District Court for the Eastern District of Pennsylvania[6] against petitioner, the Dis-

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(3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

The "Scope" portion of the Pennsylvania Rules of Professional Conduct provides: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The comments are intended as guides to interpretation, but the text of each Rule is authoritative."

[5] After Rule 3.10 was enacted, the three United States Attorneys in Pennsylvania (respondents here) urged their respective federal district courts to except Rule 3.10 from their local rules, and each of the three courts endeavored to do so. In amending their local rules, however, all three courts failed to use an advisory committee or to give the public prior notice and an opportunity to comment, as required by 28 U.S.C. § 2071, and the district court below accordingly held the excepting amendments to be invalid. Respondents did not appeal this ruling. A. 4a.

[6] Jurisdiction in the district court was based on 28 U.S.C. § 1331.

ciplinary Board of the Supreme Court of Pennsylvania, to prevent petitioner from enforcing Rule 3.10 against them or against other federal prosecutors practicing in the federal district courts in Pennsylvania.[7]

B. The Opinion of the District Court

Following limited discovery,[8] petitioner and the United States Attorneys filed cross-motions for summary judgment. By Order dated April 22, 1991, the district court granted declaratory relief in favor of the United States Attorneys, ruling that petitioner could not enforce Rule 3.10 against federal prosecutors.

The court reasoned that other federal district court local rules "implicitly reject[ed]" the inclusion of Rule 3.10 into the local rules because: (1) Rule 3.10 is not really an ethical standard but "a rule of criminal procedure that contains evidentiary standards for judicial review;" (2) it conflicts with the Federal Rules of Criminal Procedure; and (3) it is "incompatible with the historic powers and function of the grand jury." A. 36a-46a, 56a-60a. The court also held that enforcement of Rule 3.10 against federal prosecutors as a restriction of state law would contravene the Supremacy Clause of the United States Constitution. A. 61a-62a.

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[7] The United States Attorneys initially filed their lawsuit not only against the Disciplinary Board, but also against each of the individual members of the Board. These individuals are listed in the Court of Appeals' caption of the case. However, all of the individuals were dismissed as defendants at the outset of the case by stipulation of the parties.

[8] Petitioner sought discovery by way of depositions, interrogatories, and requests for production of documents in order to explore, *inter alia*, whether Rule 3.10 would in any way delay or otherwise interfere with grand jury proceedings. The district court precluded most discovery, however, except on the issue of the Pennsylvania district courts' purported exception of Rule 3.10 from their local rules. *See* Note 5, *supra*.

C. The Opinion of the Court of Appeals

The United States Court of Appeals for the Third Circuit affirmed the judgment below,[9] although on grounds different from those of the district court.

The Court of Appeals held that the adoption of Rule 3.10 was not within the local rule-making authority of the district courts for two reasons. It observed first that Rule 57, Fed. R. Crim. P., empowered federal district courts to promulgate local rules governing their practice "not inconsistent with these rules [the Federal Rules of Criminal Procedure]," and it concluded that adoption of Rule 3.10 *was* inconsistent with Rule 17, which governed the issuance of subpoenas. Although it recognized that "[t]here may not be a literal conflict between Rule 3.10 and Fed. R. Crim. P. 17," the court found that Rule 3.10 was invalid under Rule 17 by negative implication: "Rule 3.10 is inconsistent with Fed. R. Crim. P. 17 because nothing in Rule 17 grants to the district court . . . the power to screen grand jury subpoenas prior to service." A. 10a-11a.

In addition, the Court of Appeals found a limitation on the district courts' local rule-making authority in a statement in the Advisory Committee Notes to Federal Rule of Criminal Procedure 57:

> While the rules are intended to constitute a comprehensive procedural code for criminal cases in the Federal Courts, nevertheless it seemed best not to endeavor to prescribe a uniform practice as to some *matters of detail*, but to leave the individual courts free to regulate them, either by local rules or by usage. Among such matters are the mode of impaneling a jury, the manner and order of inter-

[9] *Amicus curiae* briefs in support of petitioner were filed in the Court of Appeals by the American Bar Association, the Pennsylvania Bar Association, the Philadelphia Bar Association, the Association of Trial Lawyers of America, the Pennsylvania Trial Lawyers Association, the Massachusetts Bar Association, and the National Network for the Right to Counsel.

> posing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, the order of counsel's arguments to the jury, and other similar details. (Emphasis added).

The Court of Appeals held that this comment in the Advisory Committee Notes restricted the local rule-making powers of the district courts to "matters of detail." The court deemed the ethical requirement that prosecutors submit grand jury subpoenas for judicial approval prior to serving them on attorneys not to be a "matter of detail", and therefore held the adoption of Rule 3.10 to be invalid under Rule 57. A. 11a-12a.

The Court of Appeals next examined whether the Disciplinary Board could enforce Rule 3.10 as a matter of state law, *ex proprio vigore*, against federal prosecutors who were also members of the Pennsylvania bar. The court reiterated that Rule 3.10 was "incompatible" with Rule 17, Fed. R. Crim. P. Accordingly, the court concluded that the Supremacy Clause barred the Board from enforcing the rule against federal prosecutors. A. 16a-19a.

REASONS FOR GRANTING THE WRIT

The decision below merits review by this Court because it destroys a serious and measured attempt by a State to deal with a complicated and serious problem: the unfettered and increasing reliance by prosecutors upon subpoenas issued to attorneys for evidence against the attorneys' clients. Such subpoenas cause a number of actual or potential harms. They drive a wedge of fear and suspicion into a relationship properly based upon trust and complete candor. They chill the client's willingness to reveal information when full communication about all relevant facts is essential if the lawyer is to perform properly his or her duties.[10] They create a conflict of

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[10] This Court has recognized that the attorney-client privilege rests on a client's ability to trust and make full disclosure to counsel: "The attorney client-privilege is the oldest of the privileges for

interest between attorney and client, imposing upon the lawyer a new and separate burden of protecting the lawyer's own interests and creating in the client anxiety and fear that the lawyer's main concern will now be self-protection and that the lawyer's zeal, courage, independence, and effectiveness will be diminished. Finally, they erode the balance of the adversary system by affording prosecutors but not other attorneys a weapon that may be wielded arbitrarily and at will to harass, intimidate, and even disqualify opposing counsel.

Like the American Bar Association and a number of other States,[11] the Commonwealth of Pennsylvania recognized the potential threat to the attorney-client relationship posed by such subpoenas. But the Commonwealth also acknowledged that sometimes legitimate law enforcement needs would justify such subpoenas, and Rule of Professional Conduct 3.10 provides a sensitive mechanism for balancing such needs against the necessity of protecting the delicate relationship of attorney to client. The Rule does not prohibit such subpoenas, but requires that they be screened by a neutral judicial decision maker.

The Court of Appeals summarily rejected Pennsylvania's innovative attempt to deal with a thorny problem, and the decision merits review at this time in light of a

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confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (citations omitted).

[11] The Supreme Judicial Court of Massachusetts had previously enacted a similar ethical rule requiring prior judicial approval before a prosecutor serves a subpoena on an attorney to compel the attorney to provide evidence concerning a client. *See* Mass. S.J.C.R. 3:08 (PF 15). The American Bar Association and several State bar associations have since adopted comparable ethical rules. *See* ABA Model Rule of Professional Conduct 3.8(f); Va. S. Ct. R. 3A:12 & Va. DR 8-102(A)(5); Tenn. Ct. R. DR 7-103; R.I. Rule of Professional Conduct 3.8(f).

conflicting rule governing federal prosecutors in Massachusetts and of other State ethical rules similar to the Commonwealth's. We respectfully submit that the Court should also review the decision because the Court of Appeals' definition of the local rule-making authority of the district courts is unprecedentedly restrictive and would have the effect of invalidating a host of local procedural and ethical rules. In addition, the result reached by the court below is strikingly insensitive to a State's legitimate authority to establish ethical standards for members of its bar. The Court of Appeals' Supremacy Clause analysis is significantly flawed by the court's failure to acknowledge and accommodate the weighty and often-recognized State interest which Rule 3.10 seeks to effectuate.

I. THE COURT OF APPEALS' DECISION IMPOSES UNPRECEDENTED AND UNWARRANTED RESTRICTIONS ON THE RULE-MAKING AUTHORITY OF FEDERAL DISTRICT COURTS WHICH WOULD INVALIDATE A HOST OF LOCAL RULES.

This Court has emphasized that the grant of local rulemaking authority in Rule 57, Fed. R. Crim. P., and Rule 83, Fed. R. Civ. P.,[12] must be generously construed,

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[12] Rule 57, Fed. R. Crim. P., and Rule 83, Fed. R. Civ. P., provide:

> Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. . . .

These rules were in turn promulgated pursuant to 28 U.S.C. § 2071, which provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

The Historical Note to § 2071 states that in enacting this legislation, Congress recognized "the broad rule-making power of the courts."

so that federal district courts have adequate authority to deal with the local exigencies of judicial administration. Indeed, in a recent decision concerning the scope of Rule 83, the Court pointed out that "courts traditionally have exercised *considerable authority* 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 172-73 (1989) (emphasis added).[13]

A. The Court of Appeals' Method for Adjudicating a Local Rule "Inconsistent" With a Federal Rule of Procedure and Its "Matter of Detail" Test Is Not Grounded In Precedent and Is Overly Restrictive.

However, in striking down the Pennsylvania federal district courts' adoption of Pennsylvania Supreme Court Rule of Professional Conduct 3.10, the Court of Appeals for the Third Circuit fashioned an unprecedented two-part limitation on the power of district courts to promulgate local rules. The court held that such rules must "merely fill in a matter of detail left open by the federal rules" and concern no "more than just the regulation of court or docket management." A. 12a.

First, the court ruled that the test of whether a local rule is "not inconsistent with" another federal rules of procedure is *not* whether there is a "literal conflict", A. 10a, between the two rules but rather whether a federal rule expressly authorizes the local rule: "Rule 3.10 is inconsistent with Fed. R. Crim. P. 17 [which regulates subpoena practice] because nothing in Rule 17 grants to the district court what Rule 3.10 purports to do by means of a local rule . . ." A. 10a-11a.[14] This is a definition of

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[13] *See Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 569 (3d Cir. 1989) (discussing district courts' role in employing "local rules in achieving procedural change").

[14] There is no direct conflict between the ethical requirement imposed by Rule 3.10 and Fed. R. Crim. P. 17. Rule 17 is silent concerning the persons to whom subpoenas may be directed and makes no mention of grand juries. Indeed, the Court of Appeals recognized that "there may not be a literal confiict between Rule 3.10 and Fed. R. Crim. P. 17." A. 10a.

"inconsistency" which is excessively broad, for it looks not to whether there is an actual conflict with an existing rule but to whether the federal rules affirmatively contemplate the promulgation of that local rule.

This Court has frequently approved a more generous construction of Rule 57 and its verbatim civil counterpart, Rule 83, Fed. R. Civ. P. In *Colgrove v. Battin*, 413 U.S. 149 (1973), for example, this Court upheld against Seventh Amendment challenge a local rule which limited the size of civil juries to six persons. Rather than examining the Federal Rules of Civil Procedure from the perspective of what they expressly authorized a district court to do, the Court emphasized that nothing in the Rules " 'prevent[ed promulgation of local] court rules which provide for civil juries of reduced size.' " *Id.* at 164 (quoting *Cooley v. Strickland Transportation Co.*, 459 F.2d 779, 784 (5th Cir. 1972)). The Court declined to "nullify innovative changes" or to "deny the judiciary the 'flexibility and capacity for growth and adaptation [which] is the peculiar boast and excellence of the common law.' " *Id.* at 162 (quoting *Hurtado v. California*, 110 U.S. 516, 530 (1884)). Accordingly, the local rule was held not inconsistent with the federal rule of procedure, despite the fact that it was not expressly authorized by that rule.

The second part of the Court of Appeals' test adds yet another restriction, for even if a local rule appears to be expressly authorized, it must also be "narrow in scope and must deal with 'matters of detail' not covered by the Federal Rules." A. 8a-9a. But neither Federal Rule of Criminal Procedure 57 nor its identical analogue in the Federal Rules of Civil Procedure, Rule 83, contains any language limiting the rule-making authority of the district courts to "matters of detail." *See* Fed. R. Crim. P. 57; Fed. R. Civ. P. 83. Likewise, no such restriction is found in the Advisory Committee Notes to Federal Rule of Civil Procedure 83. The "matter of detail" language is located solely in the Advisory Committee Notes to Criminal Rule 57. However, the Court of Appeals in-

terpreted it not as a simple description of the areas subject to district court regulation, but as a *stricture* on the district courts' rule-making authority.

This Court has made plain that language from the Advisory Committee Notes is not meant to be engrafted onto the rules of procedure. In *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 9 (1980), the Court rejected the Court of Appeals' adoption of a statement in the Advisory Committee Notes to Rule 54, Fed. R. Civ. P., as establishing the appropriate standard for appellate review of Rule 54(b) certifications of final (albeit partial) judgment. The Court of Appeals had ruled that the district court had abused its discretion by granting Rule 54(b) certification since an Advisory Committee comment to that Rule had stated that certification was a discretionary power to be exercised only "in the infrequent harsh case." This Court reversed, pointing out that the phrase " 'infrequent harsh case' in isolation is neither workable nor entirely reliable as a benchmark for appellate review. There is no indication it was ever intended by the drafters [of the Rule] to function as such." *Id.* at 10. Similarly, in this case, transporting the "matter of detail" language from the Commentary to the text of Rule 57, as the court below did, implants into the Rule a restrictive limitation never intended by the draftsmen.

B. The Court of Appeals' Decision Endangers a Myriad of Local Rules and Ignores the Well-Established Authority of Federal District Courts To Supervise the Conduct of Attorneys Within Their Jurisdictions.

The Court of Appeals' niggardly and cramped definition of federal district court rule-making authority would invalidate a large number of local federal district court rules, ranging from the mundane to the fundamental, and including procedural as well as ethical rules.

1. *Numerous Non-Ethical Local Rules Are Subject to Invalidation Under the Court of Appeals' Test.*

Ethical rules such as Pennsylvania Rule of Professional Conduct 3.10 are not the only local rules subject to invalidation under the Court of Appeals' "affirmatively authorized" and "matter of detail" tests. As common a local rule as the "meet and confer" rule would be invalid under the Third Circuit's decision. "Meet and confer" rules have been adopted by district courts nationwide in an effort to curb discovery abuses and streamline the civil litigation process.[15] Much like Rule 3.10, these rules impose on the use of a procedural device a restriction not specifically authorized by the federal rules. "Meet and confer" rules typically condition the filing of a motion to compel discovery (governed by Federal Rule of Civil Procedure 37(a)(2)) on a certification by counsel filing the motion that he or she has negotiated in good faith with opposing counsel to attempt to resolve the discovery dispute. Local rules imposing these conditions would fail both parts of the Third Circuit test. Requiring an attorney to confer (outside of court) with opposing counsel fails the "matter of detail" test because it imposes a significant obligation upon counsel, and it fails the Third Circuit's "inconsistency" test because such a rule is not affirmatively authorized by the applicable federal rule of procedure, Rule 37(a)(2), Fed. R. Civ. P.

In addition, other local rules which impose procedural demands on litigants not expressly contemplated by the federal rules of procedure will be subject to invalidation under the Court of Appeals' analysis. For example, a number of federal district courts require by local rule that a party moving for summary judgment submit with that motion a statement of material facts as to which

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[15] *See, e.g.*, D. Alaska Local Rule 5(E); D. Conn. Local Rule 9(d)(4); D. Kan. Local Rule 210(j); N.D. & S.D. Miss. Local Rule 6(c); D. N.M. Local Rule 37; D. Wy. Local Rule 207(o).

there is no genuine issue.[16] Because such a pleading is not authorized by Federal Rule of Civil Procedure 56 governing motions for summary judgment, however, the Court of Appeals' test demands that local rules requiring the statement be stricken as "inconsistent" with Rule 56.

Also susceptible to invalidation under the Court of Appeals' analysis are district court "continuing representation" rules that require an attorney to obtain court approval before withdrawing from representation of a client.[17] Like Rule 3.10, a "continuing representation" rule imposes a procedural requirement on counsel to seek court approval before pursuing an otherwise lawful course of conduct. It would be difficult to dismiss a "continuing representation" rule, which prevents counsel from prejudicing clients by withdrawing from representation at an inopportune point during litigation, as addressing only a "matter of detail." [18]

2. *The Majority of Ethical Local Rules Are Subject to Invalidation Under the Court of Appeals' Test.*

The Court of Appeals' decision will have its most dramatic impact on the district courts' ability to promulgate rules of ethical conduct. Few of the ethical rules adopted by federal district courts can survive the Court of Ap-

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[16] *See, e.g.*, C.D. Cal. Local Rule 7.14.2; D.C. Local Rule 108(h); S.D. Ga. Local Rule 6.6; D. Idaho Local Rule 56.1(a); M.D. Tenn. Local Rule 8(b)(7)(b); E.D. Wis. Local Rule 6.05(a)(1).

[17] *See, e.g.*, N.D. Ala. Local Rule 83.1(e); C.D. Cal. Local Rule 2.8.2.1; S.D. Fla. Local Rule 16(D)(3); N.D. Ill. Local Rule 3.15; N.D. Tex. Local Rule 13.5.

[18] Likewise, local rules which require counsel to obtain court approval prior to interrogating jurors after a case has concluded are unlikely to survive scrutiny under a "matter of detail" analysis. Whether counsel contacts and interviews jurors after trial cannot be fairly described as a matter of "court administration." *See, e.g.*, E.D. & W.D. Ark. Local Rule 25; D.C. Local Rule 115(b); S.D. Ga. Local Rule IV(8); N.D. Ind. Local Rule 44; E.D. Wash. Local Rule 47(f); N.D. W.Va. Local Rule 1.19; E.D. Wis. Local Rule 8.07.

peals' analysis. Yet as early as *Ex parte Burr*, 23 U.S. (9 Wheat.) 529 (1824), Chief Justice Marshall recognized the authority of federal district courts to regulate the conduct of attorneys:

> [I]t is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court.

Id. at 530. The Chief Justice went on to describe the power to regulate the conduct of attorneys as "incidental to all courts, and . . . necessary for the preservation of decorum, and for the respectability of the profession." *Id.* at 531.

More recently, in *Frazier v. Heebe*, 482 U.S. 641 (1987), this Court reaffirmed the authority of the federal district courts to regulate the attorneys that practice before them: "[A] district court has discretion to adopt local rules that are necessary to carry out the conduct of its business." *Id.* at 645 (citations omitted).[19] The district courts' discretion is not without limits, as *Frazier* recognized, since local rules must be consistent with the rules of procedure promulgated by this Court, with acts of Congress, and with "'the principles of right and justice.'" *Frazier*, 482 U.S. at 645 (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring)); *see also id.* at 645-46 & n.4. But the Court has never suggested that the rule-making authority of district courts is restricted to "matters of detail."

The Federal Rules of Civil and Criminal Procedure make no attempt to dictate what ethical rules should govern practitioners in the federal courts. Federal district courts commonly adopt by local rule the ethical

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[19] *See also In re Snyder*, 472 U.S. 634, 643 (1985) ("Courts have long recognized an inherent authority to suspend or disbar lawyers."); *Theard v. United States*, 354 U.S. 278 (1957).

standards of the States in which they sit.[20] Few of these ethical standards would pass muster under the Court of Appeals' two-part test, however. For example, Rule 3.3 (a)(4) of the ABA Model Rule of Professional Conduct directs that "[a] lawyer shall not knowingly offer evidence that the lawyer knows to be false." Model Rule of Professional Conduct 3.3(a)(4) (1983).[21] This prohibition against offering perjured testimony can hardly be characterized as a "matter of detail" addressing "court administration," and it is certainly not expressly authorized by any existing federal rule. All federal district court local rules adopting Model Rule 3.3(a)(4) would therefore be invalid.

Similarly, district court local rules adopting ABA Model Rule of Professional Conduct 3.8(d) would be defective under both the Court of Appeals' "matter of detail" test and its method for determining "inconsistency". Rule 3.8(d) dictates that a prosecutor shall:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . . .

This rule imposes an important procedural *and* ethical obligation on prosecutors in order to assure the fairness of criminal trials. It obviously cannot be dismissed as a

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[20] *See, e.g.*, E.D. Pa. Local Rule 14(IV)(B); M.D. Pa. Local Rule 304.2; W.D. Pa. Local Rule 22(I)(B); N.D. Ala. Local Rule 83.1(f); D. Del. Local Rule 83.6(d)(2); D. Idaho Local Rule 83.6(a); D. Kan. Local Rule 407(a); D. Or. Local Rule 110-3; E.D. Tenn. Local Rule 83.6

[21] The corollary to Rule 3.3(a)(4) in the Model Code of Professional Responsibility is DR 7-102(A)(4) which counsels: "In his representation of a client, a lawyer shall not knowingly use perjured testimony or false evidence." Model Code of Professional Responsibility DR 7-102(A)(4) (1980). With the exception of California, every state in the country substantially follows either the Model Rules, the Model Code, or some combination of the two. *See* ABA/BNA Lawyers' Manual on Professional Conduct, 1:3-4 (July 1992).

mere "matter of detail." Likewise, the disclosure mandated by Rule 3.8(d) is, under the Third Circuit's approach, "inconsistent" with a federal procedural rule, Federal Rule of Criminal Procedure 16 governing discovery, because it is not expressly authorized by that rule. It is difficult to imagine what ethical rules would survive the Court of Appeals' two-part test.[22]

II. THE COURT OF APPEALS' SUPREMACY CLAUSE ANALYSIS IS INSENSITIVE TO THE IMPORTANT STATE INTEREST IN REGULATING THE CONDUCT OF ATTORNEYS.

States have long played the leading role in the regulation of the conduct of attorneys licensed to practice within their jurisdictions, whether the attorneys were federal prosecutors, state public defenders, or private practitioners. Indeed, the Court of Appeals below observed that "Pennsylvania does have an important interest in regulating the conduct of attorneys licensed to practice in the state." A. 18a-19a. The Court of Appeals' ostensible regard for the State interest in overseeing attorney conduct is, however, a mirage due to its mechanical and categorical Supremacy Clause analysis.

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[22] The following ethical rules are among those threatened by one or both parts of the Third Circuit's test: rules requiring an attorney to keep the client reasonably informed about the status of a matter (Model Rule of Professional Conduct 1.4 (1983)); rules regulating the reasonableness of fees (Model Rule 1.5); rules directing an attorney not to reveal clients' confidences (Model Rule 1.6); rules regarding conflicts of interest (Model Rules 1.7-1.9); rules regulating the safekeeping of the property of clients (Model Rule 1.15); rules relating to an attorney acting as an intermediary between clients (Model Rule 2.2); rules directing that an attorney not bring frivolous claims (Model Rule 3.1); rules requiring that an attorney make reasonable efforts to expedite litigation (Model Rule 3.2); rules regarding candor toward the tribunal, including the requirements that an attorney disclose adverse controlling authority and disclose adverse material facts in an ex parte proceeding (Model Rule 3.3); rules relating to trial publicity (Model Rule 3.6); rules prohibiting an attorney from communicating with a person represented by counsel (Model Rule 4.2); and rules regulating advertising and the solicitation of clients (Model Rules 7.1-7.5).

The Court of Appeals concluded that Rule 3.10 could not be enforced against federal prosecutors as a matter of State law if it "actually conflicts with *or* is incompatible with federal law." A. 17a (emphasis added). But the court's extremely broad "incompatibility" test was essentially the same as its two-part test for determining the validity of a local federal district court rule. The court held that Rule 3.10 violated the Supremacy Clause both because it was "inconsistent" with Rule 17, Fed. R. Crim. P., (because not expressly authorized by that Rule) and because the requirement of pre-service judicial review was not "contemplated by the Federal Rules." A. 19a.

Reading such a broad interpretation of 'incompatibility" into the Supremacy Clause is inappropriate, especially where, as here, federal law has not completely preempted the field at issue but instead has acknowledged the "compelling" State interest in regulating the conduct at issue. This Court has repeatedly recognized the States' critical interest in regulating attorney behavior. In *Leis v. Flynt*, 439 U.S. 438 (1979), the Court stated:

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They are also responsible for the discipline of lawyers.

Id. at 442. Similarly, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court emphasized that the States have "a compelling interest in the practice of professions within their boundaries," and that as part of their authority to protect the public they have "broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* at 792. *See also Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982);[23] *Ohralik v. Ohio State*

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[23] "The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attor-

Bar Ass'n, 436 U.S. 447, 460 (1978); *Cohen v. Hurley*, 366 U.S. 117, 123-24 (1961). Additionally, the Court has stressed that "[t]he State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance." *Middlesex*, 457 U.S. at 434. Many traditional ethical rules impose obligations upon attorneys *vis-a-vis* one another within the adversary system, and many enforce procedural obligations (*e.g.*, the obligation of prosecutors to disclose exculpatory evidence) that have far greater substantive consequences than those of Rule 3.10.

Because attorney conduct has been traditionally regulated by the States, there is a presumption here against finding federal pre-emption of State law. The Court in *California v. ARC America Corp.*, 490 U.S. 93 (1989), stated that "[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 101 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715-16 (1985).[24] Rather than respecting this presumption and attempting to reconcile the State and federal interests at issue, the Court of Appeals held that since

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neys it licenses. States traditionally have exercised extensive control over the professional conduct of attorneys." *Middlesex*, 457 U.S. at 434.

[24] The reliance of the court below on this Court's decision in *Sperry v. Florida*, 373 U.S. 379 (1963), is wholly misplaced. In that case, a federal statute, 35 U.S.C. § 31, affirmatively prescribed that non-lawyers could be licensed to practice before the United States Patent Office. When the State of Florida ruled that such work constituted the "practice of law" and could accordingly only be performed by lawyers, this Court held that in view of the federal statute's "unqualified authorization" of non-attorney practitioners, the Supremacy Clause prevented enforcement of the State unauthorized practice rules. The case thus involved a flat conflict of State and federal law.

Rule 17, Fed. R. Crim. P., did no expressly authorize judicial screening of grand jury subpoenas, Rule 3.10 was "inconsistent" with Rule 17. Just as adoption of such an expansive view of "inconsistency" will result in the invalidation of numerous ethical rules adopted by federal courts, *see supra* at section I.B., so too will it prevent the enforcement of State ethical rules against federal prosecutors as a matter of State law.[25]

A ruling that the Supremacy Clause bars enforcement of certain State ethical rules against federal prosecutors is of particular importance because a number of federal district courts have foregone adopting any rules of professional conduct and instead rely directly on State ethical codes to regulate attorney conduct. For example, the federal district courts for the Northern and Southern Districts of Iowa have not adopted any ethical rules to govern the members of their bars. Accordingly, the ethical conduct of federal prosecutors in States such as Iowa is restricted only by the rules of professional conduct of the various State bars of which those prosecutors are members.

Contrary to the restrictive approach taken by the Court of Appeals, the proper Supremacy Clause analysis

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[25] The Department of Justice has occasionally taken the remarkable position that its attorneys should be considered exempt from ethical restrictions applicable to all other lawyers. Except for the decision below, courts have unanimously rebuffed this contention. *See, e.g., United States v. Lopez*, 765 F. Supp. 1433, 1445 (N.D. Cal. 1991) (discussing Department of Jusitce policy, set forth in a June 8, 1989 memorandum issued by Attorney General Richard Thornburgh, which "seeks to exempt DOJ attorneys from compliance with the ethical duties created by the rule [DR 7-104]"). The court rejected the government's argument, stating that "the Department and its attorneys must be held accountable to the same court-adopted ethical rules that govern all other lawyers." *Id.* at 1450. *See also United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 111 S. Ct. 192 (1990) (" 'DR 7-104(A)(1) may be found to apply in criminal cases, . . . to government attorneys . . . [and] to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors.' ") (quoting *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983)).

is not whether State law is "incompatible" with federal law in the sense that it is not expressly authorized by federal law. Rather, as this Court has recently reiterated, the proper test is whether State law "actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *ARC America Corp.*, 490 U.S. at 100-01 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (other citations omitted). Here, the Court of Appeals gave short shrift to the States' traditional role in regulating the ethical conduct of members of their bars, and made no attempt to harmonize the significant federal and State interests at issue.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE FEDERAL RULE OF LAW GOVERNING UNITED STATES PROSECUTORS IN THE COMMONWEALTH OF MASSACHUSETTS AND THREE OTHER STATES.

The decision of the court below, holding Pennsylvania Rule 3.10 invalid both as a local federal district court rule and as a State disciplinary rule when applied to federal prosecutors, squarely conflicts with the law of at least four other States and the federal law governing prosecutors in the United States Attorney's Office for the District of Massachusetts, as established in *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (*en banc*) (affirming the decision of the district court by an equally divided *en banc* court).

At issue in *Klubock* was the enforceability of a Massachusetts rule similar to Pennsylvania's Rule 3.10, Massachusetts Supreme Judicial Court Prosecutorial Function Rule 15 ("PF 15"), which provides:

> It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide

> evidence concerning a person who is represented by the attorney/witness.

The United States and a number of federal prosecutors, who were also members of the Massachusetts bar, challenged the validity of PF 15, the district court upheld the rule, *United States v. Klubock*, 639 F. Supp. 117 (D. Mass. 1986), a divided panel of the United States Court of Appeals for the First Circuit affirmed, *United States v. Klubock*, 832 F.2d 649 (1987) (amended opinion), and an equally divided *en banc* court affirmed the district court's decision sustaining PF 15.[26]

The court below acknowledged that its decision was in conflict with the appellate panel and district court decisions in *Klubock*, stating that "[a]fter a careful examination of the various opinions in *Klubock* we find the dissenting opinion of Chief Judge Campbell to be convincing. Much like PF 15, Rule 3.10 is not 'the sort of detail that fits within the court's local rule-making powers.'" A. 16a (quoting *United States v. Klubock*, 832 F.2d 649 (1st Cir. 1986) (*vacated*) (dissenting opinion)).[27]

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[26] While the panel's judgment was vacated and the panel's opinion withdrawn when rehearing *en banc* was granted, the Per Curiam Opinion En Banc reproduced for publication, as amended, the original panel opinion and dissent:

> While the panel opinions no longer have standing on their own, the members of the en banc court make reference to them in the course of their opinions and hence they are issued to supplement the en banc opinions.

832 F.2d at 665.

[27] The court below also cited a number of cases involving challenges by individual lawyers or their clients to subpoenas issued to the lawyers, including *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir. 1986), *cert. denied*, 475 U.S. 1108 (1986), *In re Klein*, 776 F.2d 628 (7th Cir. 1985), *In re Grand Jury Matter*, 926 F.2d 348 (4th Cir. 1991), *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1581 (1991), and *United States v. Perry*, 857 F.2d 1346 (9th Cir. 1988), as rejecting any requirement that the government show "need" before subpoenaing an attorney. *See* A. 13a n.2. None of those cases, however, arose out of a formally promulgated State rule.

The vacated *Klubock* panel majority, on the other hand, had held that "PF 15 is clearly a local rule which seeks to control discipline within its bar membership and, thus, [is] within the general rule-making power of district courts." 832 F.2d at 653. The panel had emphasized the ethical hazards inherent in the service of grand jury subpoenas on attorneys: (1) that a "chilling wedge" is driven between attorney and client as a result of the client's suspicions "that his legitimate trust in his attorney may be subject to betrayal," *id.*; (2) that an "immediate conflict of interests" is created between the attorney's roles as advocate and witness, *id.*; (3) that there is a "diversion of interests and resources brought about by the conversion of the attorney into a witness," *id.*; (4) that the attorney may be disqualified because "converted into a possible witness in a case against his client," *id.* at 654; and (5) that prosecutors may abuse the use of subpoenas in the exchanges "of counsel versus counsel in their adversarial roles," *id.*[28] In sharp contrast to the approach of the Third Circuit, the First Circuit panel concluded that "silence in the Federal rules of procedure does not necessarily mean that the courts are powerless to correct perceived problems as they arise, either by decision, or by local rule, where appropriate." *Id.* at 656. Because nothing in Federal Rule 17 *prohibited* an ethical rule governing prosecutors' service of subpoenas on attorneys, the panel found no inconsistency between Rule 17 and PF 15.[29]

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[28] The panel also stressed the advantages of allowing experimentation with new rules of procedure at the local level: "In the event that national decision makers ultimately seek to resolve the problem, the experience gained through local efforts can only make for more informed federal rulemaking." 832 F.2d at 655.

[29] The Department of Justice did not seek certiorari in *Klubock*; however, its own statistics reveal that the *Klubock* decision has not "stemmed the flood of subpoenas to lawyers." Rudolf & Maher, *Grand Jury Practice*, 5 Crim. Just. 22, 24 (1990) (analyzing United States Department of Justice statistics showing 50% increase in subpoenas issued to attorneys between 1985 and 1989).

The conflict between the rules governing federal prosecutors in the Commonwealths of Pennsylvania and Massachusetts is a significant one. Moreover, ethical rules similar to those of Massachusetts and Pennsylvania have been adopted by the highest courts in Virginia, Tennessee, and Rhode Island and presumptively govern the actions of federal prosecutors there. *See* Va. S. Ct. R. 3A:12 & Va. DR 8-102(A)(5); Tenn. Ct. R. DR 7-103; R.I. Rule of Professional Conduct 3.8(f). And, on February 12, 1990, the House of Delegates of the American Bar Association amended Rule 3.8 of the Model Rules of Professional Conduct to require that prosecutors obtain advance judicial approval of subpoenas issued to attorneys.[30]

The reason for the enactment of these ethical rules is a widely shared perception that a routine practice of haling defense lawyers before grand juries is highly unfair because it unreasonably erodes the specially protected relationship between attorney and client.[31] A num-

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[30] Model Rule 3.8(f) provides:

> The prosecutor in a criminal case shall:
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> * * * *
>
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information reasonably sought is not protected from disclosure by an applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
>
> (iii) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

[31] Although it is true, as the court below observed, *see* A. 7a, that this Court has held that a citizen does not have a Sixth Amendment right to counsel prior to indictment by a grand jury or the filing of formal criminal charges, *Kirby v. Illinois*, 406 U.S. 682 (1972), it is nevertheless the case that targets or subjects of a grand jury are often represented by counsel. The State interests

ber of courts have expressed such concerns and have refused to enforce particularly burdensome subpoenas to lawyers.[32] In addition, federal prosecutors' increasing resort to attorney subpoenas has been the subject of much debate and criticism among legal commentators.[33] In-

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which rules such as Pennsylvania's Rule 3.10 attempt to define and protect are the ethical obligations of prosecutors with regard to this existing attorney-client relationship between defense counsel and a client. Legal rules of ethics often address relationships between adversarial lawyers in situations where a client would have no constitutional right to have counsel appointed.

[32] *See In re Grand Jury Matters*, 751 F.2d 13, 18 (1st Cir. 1984) ("To call defense attorneys before the grand jury, in connection with an investigation of the same activities for which their clients were standing trial in state court, while the attorneys were preparing for this major felony trial, could be taken as a veiled threat, with such potential for harm to the state defendants and the defense bar as to require the government to show with some particularity why the grand jury's investigation required the execution of the subpoenas at this particularly sensitive moment."); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1010, *vacated as moot*, 697 F.2d 112 (4th Cir. 1982) ("Where the attorney for the target of an investigation is subpoenaed, . . . attorney-client privilege considerations and sixth amendment interests arise automatically and a preliminary showing must be made before the attorney can be forced to appear before the grand jury."); *In re Grand Jury Subpoena (Legal Services Center)*, 615 F. Supp. 958 (D. Mass. 1985) ("To permit the subpoenas to stand would result in the veritable destruction of the parties' attorney-client relationships. It would also pose a significant chilling effect on the ability of attorneys . . . to represent their clients zealously within the bounds of the law.").

[33] *See, e.g.*, Bresler, *Quashing Witness Subpoenas Without Explicit Authority From the Federal Rules of Criminal Procedure*, 25 Crim. L. Bull. 315 (1989); Cramton & Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291 (1992); Falsgraf, *A Dangerous Wedge Between Lawyer and Client*, 72 A.B.A.J. 8 (July 1986); Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, 1 Crim. Just. 2 (1986); Glanzer & Taskier, *Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity*, 75 J. Crim. L. & Criminology 1070 (1984); Krieger & Van Dusen, *The Lawyer, the Client and*

deed, the court below acknowledged "the serious problems associated with the practice of government prosecutors subpoenaing attorneys to testify about past or present clients before grand juries." A. 19a. Likewise, the respondents in their brief below recognized the "increasing number of attorney subpoenas," Brief for the Appellees, at 34 n.18, and the United States Department of Justice has noted "the potential effects upon an attorney-client relationship that may result from the

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the New Law, 22 Am. Crim. L. Rev. 737 (1985); Peirce & Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 Hastings L.J. 821 (1985); Rudolf & Maher, *Grand Jury Practice*, 5 Crim. Just. 22 (1990); Rudolf & Maher, *The Attorney Subpoena: You Are Hereby Commanded to Betray Your Client*, 1 Crim. Just. 14 (1986); Rudovsky, *The Right to Counsel Under Attack*, 136 U. Pa. L. Rev. 1965 (1988); Sheridan, *Grand Jury Subpoenas to Criminal Defense Attorneys: Massachusetts Restrains the Federal Prosecutor Through An "Ethical" Rule*, 2 Geo. J. Legal Ethics 485 (1988); Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Pa. L. Rev. 1783 (1988); Suni, *Subpoenas to Criminal Defense Lawyers: A Proposal for Limits*, 65 Or. L. Rev. 215 (1986); Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 Am. Crim. L. Rev. 95 (1985); Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 Minn. L. Rev. 917 (1992); Zimmerman & Lavine, *Attorney Subpoenas Imperil Choice of Counsel*, 26 Trial 51 (April 1990); Comment, *Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War*, 9 Campbell L. Rev. 347 (1987); Comment, *Attorneys' Subpoenas: The Constitutional, Ethical, and Practical Issues*, 60 Temple L.Q. 121 (1987); Note, *Benefactor Defense Before the Grand Jury: The Legal Advice and Incrimination Theories of the Attorney-Client Privilege*, 6 Cardozo L. Rev. 537 (1985); Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 Duke L.J. 145; Note, *Grand Jury Subpoenas of a Target's Attorney: The Need for a Preliminary Showing*, 20 Ga. L. Rev. 747 (1986); Note, *Attorney-Client Privilege and Right to Counsel for the Party Under Investigation*, 19 Wake Forest L. Rev. 487 (1983); Note, *After United States v. Klubock: Can Massachusetts' New Ethical Rule Curb the Practice of Subpoenaing the Attorneys of Grand Jury Targets?*, 11 W. New Eng. L. Rev. 283 (1989).

issuance of a subpoena to an attorney for information relating to the representation of a client," 7 *Department of Justice Manual* at 9-2.161(a) at 9-51 (1992—1 Supp.).

Undoubtedly, there is a strong interest in insuring "that the grand jury remain 'free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.'" *United States v. Williams*, 112 S. Ct. 1735, 1743 (1992) (quoting *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973)). Despite its broad authority, however, "[t]he investigatory powers of the grand jury are . . . not unlimited." *United States v. R. Enterprises, Inc.*, 111 S. Ct. 722, 727 (1991). *See Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). By creating a pre-service judicial screening mechanism for attorney subpoenas, ethical rules such as the Commonwealth of Pennsylvania's Rule 3.10 attempt to accommodate both the federal grand jury's valid need to gather evidence and the important State interest in protecting the sanctity of the attorney-client relationship.

CONCLUSION

We respectfully submit that review of the decision below is timely and appropriate. The test employed by the Court of Appeals for determining the authority of a district court to promulgate local rules is unduly narrow and restrictive and would decimate existing local rules. Moreover, the rigid and expansive Supremacy Clause analysis applied by the court in an area of preeminent State interest and authority, the regulation of lawyers, is plainly inappropriate. The State rule at issue in this case deserves far more deference since it is not in actual conflict with a federal rule. Finally, there is now plainly a conflict between the rules governing federal prosecutors in the Commonwealth of Massachusetts and in the Commonwealth of Pennsylvania, and the issue is likely to arise in the States of Virginia, Tennessee, and Rhode Island. Insofar as the American Bar Association's Model

Rule of Professional Conduct 3.8(f) is adopted by other States, the conflict will be presented in other jurisdictions. A more careful and discriminating analysis than that employed by the court below is required to accommodate two important and legitimate interests: the right of the federal grand jury to obtain speedily and efficiently every person's evidence, and the right of the State to establish and enforce standards of ethical behavior for attorneys. There is no need for the attorney-client relationship to become a casualty of the war on crime.

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 91-1425

MICHAEL M. BAYLSON, JAMES J. WEST,
THOMAS W. CORBETT, JR.

v.

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, BYRD R. BROWN; JAMES F. MUNDY; MURRAY S. ECKELL; RICHARD D. CILARDI, JR.; JUDITH HEH; JOHN R. PADOVA; JOHN A. TUMOLO; DANIEL R. GILBERT; WILLIAM L. KELLER; GEORGE F. DOUGLAS, JR.; BERLE L. SCHILLER; CHARLES V. STOELKER, JR.; FREDERICK WELLS HILL

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA,
Appellant.

Argued Nov. 21, 1991

Decided Sept. 16, 1992

As Amended Sept. 21, 1992

Michael M. Baylson (argued), U.S. Atty., Philadelphia, Pa., for appellees Baylson and West.

Richard A. Sprague (argued), Sprague & Sprague, Philadelphia, Pa., for appellant.

John J. Kerrigan, Jr. (argued), Newtown Pa., for amicus PA Trial Lawyers Ass'n.

Michael A. Bloom (argued), Philadelphia, Pa., for amicus PA Bar Ass'n.

Before: MANSMANN, COWEN and HIGGINBOTHAM, Circuit Judges.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, Jr., Circuit Judge.

The issue on this appeal is whether Rule 3.10 of the Pennsylvania Rules of Professional Conduct, which was adopted by the federal district courts in Pennsylvania, may be enforced against federal prosecutors practicing before the federal district courts in that state. The rule requires a federal prosecutor to obtain prior judicial approval before serving a grand jury subpoena on an attorney where the attorney would be asked to testify about past or present clients. We hold that Rule 3.10 may not be enforced against federal prosecutors because its adoption as federal law falls outside the rule-making authority of the district courts, and its enforcement as state law violates the Supremacy Clause of the United States Constitution.

I

On November 7, 1988, the Supreme Court of Pennsylvania adopted Rule 3.10 of the Pennsylvania Rules of Professional Conduct governing lawyers who practice in Pennsylvania. Rule 3.10 provides in its entirety:

> A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney witness. Adopted Nov. 7, 1988, effective Nov. 26, 1988.

COMMENT

> It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6 [concerning confidentiality of information], the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

Before the addition of Rule 3.10, each of the three federal district courts in Pennsylvania had adopted by local rules the Rules of Professional Conduct of the Pennsylvania Supreme Court, as amended from time to time by the state supreme court, as the standards of professional conduct for attorneys admitted to the bars of those federal courts.

After Rule 3.10 was enacted, all three federal district courts in Pennsylvania purported to revise their local rules to state that Rule 3.10 had no application in their respective jurisdictions. All three districts excepted Rule 3.10 from their local rules without using an advisory committee and without giving the public prior notice and opportunity to comment as required by 28 U.S.C. § 2071.

On July 19, 1989, after the federal district courts had excepted Rule 3.10 from their local rules, plaintiffs, Michael Baylson, James West and Thomas Corbett, Jr., (hereafter collectively referred to as Baylson) members of the Pennsylvania bar and Acting United States Attorneys for the three federal districts in Pennsylvania, sued defendant, the Disciplinary Board of the Supreme Court of Pennsylvania (Board), in the federal District

Court for the Eastern District of Pennsylvania, to prevent defendant from enforcing Rule 3.10 against them and other federal prosecutors who are members of the Pennsylvania Bar.

Specifically, plaintiffs complained that Rule 3.10 violated Article II of the United States Constitution by infringing on their executive prosecutorial duties. Plaintiffs also claimed that Rule 3.10 conflicted with Federal Rule of Criminal Procedure 6(e) by improperly interfering with the grand jury process. Finally, plaintiffs argued that, because the district courts' amendments deleting Rule 3.10 from the Local Rules were supreme federal laws, application of Rule 3.10 to federal prosecutors would violate the Supremacy Clause of the Constitution.

Both Baylson and the Board moved for summary judgment. On April 22, 1991, the district court granted Baylson's motion for summary judgment. First, the court held that the amendments by the federal district courts deleting Rule 3.10 from their local rules were invalid because the district courts had not used advisory committees, nor had they notified and sought comment from the public, as they are required to do by the Judicial Improvement Act, 28 U.S.C. § 2071(b). The court then agreed with the Board that, since the amendments to the local rules were invalid, Rule 3.10 remained in force. The court also agreed with the Board that insofar as the district courts had adopted it, Rule 3.10 was federal law. Nonetheless, the court concluded that Rule 3.10 could not be enforced against federal prosecutors in the Eastern, Middle and Western Districts of Pennsylvania because the rule violated the Supremacy Clause of the United States Constitution.

The Board now appeals. Baylson has not appealed the district court's holding that the amendments by the three federal district courts, excepting Rule 3.10 from their local rules, were invalid.

II

In its order granting summary judgment in favor of Baylson, the district court held that "the United States District Courts for the Western, Middle and Eastern Districts of Pennsylvania have not adopted Pennsylvania Rule of Professional Conduct 3.10 and that Rule 3.10 is in conflict with federal law." *Baylson v. Disciplinary Board of Supreme Court of Pennsylvania*, 764 F.Supp. 328, 349 (E.D.Pa.1991).

As far as we can tell, the district court based its holding on four different grounds.

As to the first ground, the district court reasoned that the local disciplinary rules themselves implicitly reject the absorption of Rule 3.10 because the local rules are not meant to establish mechanisms of judicial review, rules of procedure or evidentiary standards. Rule 3.10, according to the district court, does exactly that. It "initially creates a rule of criminal procedure that contains evidentiary standards for judicial review and then impresses an ethical duty upon prosecutors to adhere to that procedure." *Baylson*, 764 F.Supp. at 337. In short, the district court read Rule 3.10 as a procedural and evidentiary rule masquerading as a rule of conduct.

As to the second ground, the court determined that Rule 3.10 conflicts with two specific provisions of the Federal Rules of Criminal Procedure: Rule 6(e) and Rule 17. Rule 6(e) generally prohibits the disclosure of matters occurring in front of the grand jury. According to the district court, Rule 3.10 violates this policy of secrecy because it would force the government to disclose secret grand jury information in every instance in which a subpoena commands an attorney to give evidence about a client.

Rule 17 regulates subpoena practice. Specifically, Fed.R. Crim.P. 17 provides in relevant part that the clerk of the court, without judicial supervision, shall issue a sub-

poena to a party requesting it. Thus, according to the district court, Rule 3.10 conflicts with Fed.R.Crim.P. 17 because Rule 3.10 requires prior judicial approval of an attorney subpoena, whereas Fed.R.Crim.P. 17 makes no allowance for judicial intervention in the issuance or service of a subpoena to an attorney. *Id.* at 346.

As to the third ground, the district court found Rule 3.10 to conflict with the historic powers and functions of the grand jury for two reasons: First, the review procedure required by Rule 3.10 would invite delays and detours thereby interfering with the speed of the grand jury investigations. *Id.* at 340. Second, Rule 3.10 would subvert the autonomy of the grand jury by interposing substantive restraints on the grand jury's ability to gather evidence. *Id.*

As to the fourth ground, the district court determined that Rule 3.10 impermissibly broadens the scope of the attorney-client privilege at the expense of the grand jury, again for two reasons. First, according to the district court, the attorney-client privilege only protects information learned directly from the client and does not prevent an attorney from testifying about information learned from sources other than the client. On the other hand, Rule 3.10 seems to go beyond the attorney-client privilege and permits an attorney to refuse to divulge all confidential client information, whether learned from the client or from any other source. *Id.* at 345. Second, the district court reasoned that a witness who is called to testify before the grand jury cannot decline to do so altogether on the basis of a privilege, but rather must assert the privilege document by document, or question by question. Rule 3.10, on the other hand, would permit an attorney to decline to appear before the grand jury without having to assert the privilege document by document and question by question. *Id.* at 344.

On appeal, the Disciplinary Board attempts to refute each one of the grounds of decision announced by the

district court. However, at bottom, the argument of the Board in favor of Rule 3.10 comes down to this: allowing prosecutors to subpoena an attorney to testify about the attorney's client before a grand jury creates the real possibility of causing an irreconcilable conflict of interest between attorney and client, threatening the client's Sixth Amendment right to counsel. According to the Board, calling an attorney as a witness before a grand jury will probably force the attorney to withdraw before trial, thereby depriving the client of the attorney of his or her own choice.

The Board's Sixth Amendment right of counsel argument, while phrased in constitutional terms, is, at least on the facts of this case, an argument of public policy regarding the attorney-client relationship. Though the Board may be correct in arguing that attorney subpoenas raise Sixth Amendment right to counsel concerns, the fact remains that a person does not have a right to counsel prior to indictment by a grand jury. *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S.Ct. 1877, 1881, 32 L.Ed.2d 411 (1972). Moreover, the Supreme Court has never held that the Sixth Amendment right to counsel includes the absolute right to counsel of one's own choice.

In short, we agree with the decision of the district court that Rule 3.10 may not be enforced against federal prosecutors in the three district courts of Pennsylvania. But we do not find it necessary to rest our decision on any of the broad grounds announced by the district court. Instead, we think it suffices to hold that Rule 3.10 is invalid because its adoption as federal law falls outside the local rule-making authority of the federal district courts, and its enforcement as state law violates the Supremacy Clause of the United States Constitution. The reasons for our decision follow.

III

The Supreme Court, pursuant to 28 U.S.C. § 2072(a), is vested with the authority to prescribe rules of practice and procedure for the federal courts. The federal district and circuit courts may, however, pursuant to 28 U.S.C. § 2071(a), prescribe local rules of practice so long as these rules are consistent with the rules of practice and procedure promulgated by the Supreme Court under section 2072.

Federal Rule of Criminal Procedure 57, itself adopted by the Supreme Court pursuant to 28 U.S.C. § 2072(a), sets out the power of the district court to adopt local rules relating to criminal matters. Rule 57 provides in relevant part that each district court may from time to time make or amend the rules governing its practice except that these rules may not be inconsistent with the Federal Rules of Criminal Procedure. The Advisory Committee's comments on Rule 57 go on to explain the narrow scope and purpose of Rule 57. According to the committee's comments, the purpose of Rule 57 is to leave "matters of detail" to individual courts to regulate either by local rules or by usage. As to the scope of those "matters of detail" the committee cites as examples: "the mode of impanelling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, the order of counsel's arguments to the jury and other similar details."

Accordingly, when the district court adopts a local rule which touches on criminal matters, that rule must comply with at least two requirements. First, pursuant to 28 U.S.C. § 2071(a) and F.R.Crim.P. 57, the local rules must not be inconsistent with the Federal Rules of Criminal Procedure. Second, as the advisory notes to Rule 57 made clear, the local rules must be narrow in scope and must deal with "matters of detail" not covered by the

Federal Rules.[1] Local rules that fail to comply with those requirements are nullities. *Frazier v. Heebe*, 482 U.S. 641, 646, 107 S.Ct. 2607, 2611, 96 L.Ed.2d 577 (1987).

Among the rules which fall under the local rule-making authority of the district courts are rules regulating the conduct of attorneys practicing before them. *Theard v. United States*, 354 U.S. 278, 281-83, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957); *Frazier v. Heebe*, 482 U.S. 641, 645-46, 107 S.Ct. 2607, 2611, 96 L.Ed.2d 557 (1987). Rule 3.10 was adopted by the district courts for the Eastern, Middle and Western districts of Pennsylvania pursuant to such local rule-making authority. But in doing so, the district courts exceeded their local rule-making authority because Rule 3.10 cannot be said to be not inconsistent with Fed.R.Crim.P. 17 as required by 28 U.S.C. § 2071(a), and because Rule 3.10 goes beyond those "matters of detail" contemplated by Fed.R.Crim.P. 57.

A

Federal Rule of Criminal Procedure 17 regulates subpoena practice. The relevant sections for purposes of our analysis are subdivisions (a), (b), (c), (f) and (g).

Subdivision (a) provides: "A subpoena shall be issued by the clerk under the seal of the court. . . . The clerk shall issue a subpoena, signed, sealed but otherwise in blank to a party requesting it, who shall fill in the blanks when it is served." Subdivision (c) empowers a court to quash or modify a subpoena duces tecum if compliance

[1] This approach is consistent with the Supreme Court's emphasis that court rules are adopted under a limited congressional grant of legislative power. *See, e.g., Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10, 61 S.Ct. 422, 424-25, 85 L.Ed. 479 (1941). As stated by one commentator: "the federal courts have recognized that rulemaking authority is ultimately a legislative power residing in Congress, although delegated in large measure to the courts." J. Weinstein, *Reform Of Federal Court Rulemaking Procedures*, 76 Colum.L.Rev. 905, 927-31 (1976).

would be unreasonable or oppressive. Subdivision (g) allows the court to hold in contempt any individual who "without adequate excuse" fails to obey a served subpoena. Subdivision (b) states that if a defendant makes a showing of financial distress and need for a specific witness, "[t]he court shall order at any time, that without cost to the defendant, a subpoena be issued for service on [the] named witness." Subdivision (f) requires the entry of a court order before the clerk of court can issue a subpoena directing the attendance of a witness at a deposition.

Other than subdivisions (a), (b), (c), (f) and (g), Rule 17 makes no allowance for judicial intervention in subpoena practice. Moreover, neither Rule 17 nor any other provision in the federal rules or statutes allows for judicial intervention before a subpoena is served. Instead, subdivision (c) provides that a party may move to quash a subpoena on the grounds that compliance would be unreasonable or oppressive only after it has been served. Here, Rule 3.10 is inconsistent with Fed.R.Crim. P. 17 because it impermissibly extends the ministerial role granted the district courts in subpoena practice.

The board argues, however, that Rule 3.10 does not conflict with Fed.R.Crim.P. 17 because Fed.R.Crim.P. 17 only deals with the *issuance* of subpoenas whereas Rule 3.10 is concerned with the *service* of subpoenas. In effect, the board argues that the federal rules have left a void in the practice of subpoenas which the district court can fill by the adoption of a local rule such as Rule 3.10. Of course, the problem with this argument is that we are not concerned only with a literal conflict between Rule 3.10 and Fed.R.Crim.P. 17. Both 28 U.S.C. § 2071(a) and Fed.R.Crim.P. 57, which authorize the district court to prescribe local rules, require that the local rules not be inconsistent with the federal rules. In the present case, there may not be a literal conflict between Rule 3.10 and Fed.R.Crim.P. 17. The fact remains, however, that Rule

3.10 is inconsistent with Fed.R.Crim.P. 17 because nothing in Rule 17 grants to the district court what Rule 3.10 purports to do by means of a local rule: the power to screen grand jury subpoenas prior to service.

B

Further, even if Rule 3.10 were made to be consistent with the federal rules, its adoption would still lie outside the local rule-making authority of the district court because Rule 3.10 seeks to regulate by means of local rules an area of criminal practice and procedure which goes beyond the "matters of detail" contemplated by Fed.R. Crim.P. 57.

As we have previously stated, the Advisory Committee's comments to Fed.R.Crim.P. 57 make clear the narrow scope and purpose of the local rule-making authority of the district court. Specifically, the comments provide that the rules of practice and procedure prescribed by the Supreme Court are intended to be a "*comprehensive* procedural code for criminal cases in Federal courts," and that the district courts are free to fill in with local rules only those "matters of detail" left open by the rules. As examples of "matters of detail" which would fall within the local rule-making authority of the district court, the Advisory Committee stated: "the mode of impanelling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, the order of counsel's arguments to the jury and other similar details."

These examples of "matters of detail" are concerned with areas of court administration which the "comprehensive" procedural code promulgated by the Supreme Court left open to the federal district and circuit courts. For example, in this circuit, we have repeatedly stated that "local rules play a vital role in the district courts' efforts to manage themselves and their dockets." *Anchor-*

age Assoc. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 174 (3d Cir.1990); *Smith v. Oelenschlager*, 845 F.2d 1182, 1184 (3d Cir.1988).

Here, we believe that Rule 3.10 does more than merely fill in a matter of detail left open by the federal rules and is concerned with more than just the regulation of court or docket management. Instead, Rule 3.10 seeks to establish a broad mechanism for pre-service judicial review of attorney subpoenas, with attendant rules of procedure and rules of evidence.

The Board argues that the mechanism of judicial review Rule 3.10 seeks to establish can be adopted by the district court as a local rule because it will not interfere with federal grand jury practice. That may or may not be so. But the fatal flaw of Rule 3.10 is not whether it will disrupt federal grand jury practice. The fatal flaw of Rule 3.10 is that pre-service judicial approval of grand jury subpoenas is more than merely a "matter of detail" which the district court may properly prescribe as a local rule under Fed.R.Crim.P. 57.

C

The Board maintains that the district court may properly adopt Rule 3.10 as a function of its supervisory powers over the grand jury. We disagree because, with one notable exception in *United States v. Klubock*, 832 F.2d 649 (1st Cir.1986), *vacated, op. withdrawn, on reh., en banc*, 832 F.2d 664 (1st Cir.1987), there is no case precedent for the district court assuming the role of approving grand jury subpoenas prior to service as would be required by Rule 3.10. Instead, the Supreme Court has been very reluctant to place restraints on the power of the grand jury to issue and serve subpoenas.

In *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Supreme Court held that a trial subpoena duces tecum issued under Fed.R.Crim.P. 17(c) is not "unreasonable or oppressive" if the party

seeking to enforce the subpoena establishes that the documents sought are "evidentiary" and "relevant", that they are "not otherwise procurable reasonably in advance of trial by the exercise of due diligence," that the party "cannot properly prepare for trial without prior production of documents" and that the "application is made in good faith and is not intended as a general fishing expedition." *Nixon*, 418 U.S. at 699-700, 94 S.Ct. at 3103.

However, the Supreme Court has explicitly held that the *Nixon* requirements do not apply to grand jury subpoenas. In *United States v. R. Enterprises, Inc.*, —— U.S. ——, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991), a grand jury issued subpoenas duces tecum to several companies allegedly engaged in the interstate transportation of obscene materials. The district court denied the companies' motion to quash and, when the companies refused to comply with the subpoenas, found each of them in contempt. The Court of Appeals for the Fourth Circuit quashed the subpoenas on the grounds that they did not satisfy the "relevancy prong" of *Nixon*. The Supreme Court reversed holding that the *Nixon* requirements simply did not apply to grand jury subpoenas. *R. Enterprises*, —— U.S. at ——-——, 111 S.Ct. at 726-27.

The Supreme Court reasoned that many of the rules and restraints that apply to a trial do not apply in grand jury proceedings. *Id.* —— U.S. at ——, 111 S.Ct. at 726. The Court also wrote that the *Nixon* requirements would invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a subpoena. *Id.* —— U.S. at ——, 111 S.Ct. at 727. Here, Rule 3.10 requires a court to use the same standards in approving the service of a grand jury subpoena on an attorney as the Supreme Court held to be inapplicable to grand jury proceedings in *R. Enterprises*.[2]

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[2] In addition, the Second Circuit in *In Re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 248 (2d Cir.1986) (en banc) stated in the context of attorney subpoenas:

More recently, in *United States v. Williams*, —— U.S. ——, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), the Supreme Court considered the question of whether a district court was correct in dismissing an otherwise valid grand jury indictment because the government had failed to disclose to the grand jury substantial exculpatory evidence in its possession. In *Williams*, respondent was indicted by a grand jury on several counts of knowingly misrepresenting his assets to a financial institution in violation of 18 U.S.C. § 1014 (1988). The district court dismissed the indictment because, according to its own precedent, the government had failed to disclose substantial exculpatory evidence to the grand jury. The Court of Appeals for the Tenth Circuit affirmed the district court's decision.

The Supreme Court reversed. The court held that the district court's supervisory power over the grand jury did not extend so far as to permit it to impose upon the prosecutor a legal obligation to present exculpatory evidence to the grand jury. *Williams*, —— U.S. at ——, 112 S.Ct. at 1746. The court reasoned that:

> . . . any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. It certainly would not permit judicial reshap-

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"To impose additional requirements that the government show its need for the information sought and that the attorney is the only source for that information would hamper severely the investigative function of the grand jury."

The Seventh Circuit has similarly rejected a requirement that the government show "need" before subpoenaing an attorney. *See In re Klein*, 776 F.2d 628, 632 (7th Cir.1985). *See also In re Grand Jury Matter*, 926 F.2d 348, 350 (4th Cir.1991); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1127, 1129 (5th Cir.1990); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1495-96 (10th Cir.1990); *United States v. Perry*, 857 F.2d 1346, 1347-49 (9th Cir.1988).

> ing of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constitutional court and the grand jury itself. (Citations omitted).

Id. —— U.S. at ——, 112 S.Ct. at 1744.

R. Enterprises, Williams, and other cases in which the supreme court has been reluctant to impose substantive restraints on the grand jury,[3] suggest to us that the district court may not under the guise of its supervisory power or its local rule-making power, impose the sort of substantive restraint on the grand jury that is contemplated by Rule 3.10.

The only court which has considered and upheld a rule of conduct similar to Rule 3.10 is the Court of Appeals for the First Circuit. In *United States v. Klubock,* 832 F.2d 649 (1st Cir.1986), *vacated, op. withdrawn, on reh., en banc,* 832 F.2d 664 (1st Cir.1987), the Supreme Judicial Court of Massachusetts had adopted the following rule of professional conduct known as Prosecutorial Function 15 (PF 15):

> It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide

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[3] *See United States v. Calandra,* 414 U.S. 338, 349, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974) (The exclusionary rule does not apply to grand jury proceedings. An indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination is "nevertheless valid."); *United States v. Dionisio,* 410 U.S. 1, 17-18, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973) (The grand jury should remain "free to pursue its investigations unhindered by external influences or supervision so long as it does not trench upon the legitimate rights of any witness called before it."); *Costello v. United States,* 350 U.S. 359, 364, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956) (The hearsay rule is not enforceable to grand jury proceedings. Its enforcement "would run counter to the whole history of the grand jury institution.").

evidence concerning a person who is represented by the attorney/witness.

A panel of the Court of Appeals for the First Circuit, in a 2-1 decision, upheld the rule holding that PF 15 was well within the rule-making power of the district court to regulate the conduct of attorneys who practice before them. *Klubock*, 832 F.2d at 653. However, the court gave no consideration to the fact that, while PF 15 was labeled a rule of conduct, it was in fact a procedural rule which set up a mechanism of judicial review in such a way as no other rule of conduct ever has.

Chief Judge Campbell, dissenting, reasoned that whether or not PF 15 was labeled a rule of conduct, the limitation placed by the rule upon the grand jury's subpoena power was far too "controversial and delicate to be the sort of matter of detail that fits within a district court's local rule making power." *Id.* at 659, 660. Judge Campbell continued: "If a rule like PF 15 is required, Congress or, at least, the Supreme Court under its rule-making authority, acting at the national level, should promulgate it. A district court may not affect such a fundamental change through local rules." *Id.* at 663-664. On reconsideration, the court of appeals, sitting en banc, failed to produce a majority opinion. Instead the decision of the panel was affirmed by an equally divided court in a 3-3 decision.

After a careful examination of the various opinions in in *Klubock* we find the dissenting opinion of Chief Judge Campbell to be convincing. Much like PF 15, Rule 3.10 is not "the sort of detail that fits within the court's local rule-making powers." *See Klubock*, 832 F.2d at 660.

IV

Having held that the adoption of Rule 3.10 falls outside the local rule-making authority of the federal district courts, we now turn to the Board's contention that

Rule 3.10 may still be enforced against federal prosecutors in Pennsylvania as a state rule of Professional conduct. The district court reasoned that as a state rule of Professional conduct Rule 3.10 violates the Supremacy Clause of the United States Constitution because enforcement of Rule 3.10 "would frustrate the expeditious and just administration of the federal criminal laws." *Baylson*, 764 F.Supp. at 348.

In this appeal the Board responds that Rule 3.10 does not violate the Supremacy Clause because it is purely a rule of professional conduct, and states have primary responsibility in regulating the conduct of attorneys. Baylson in turn argues that Rule 3.10 does violate the Supremacy Clause because it is really a rule of procedure masquerading as a rule of conduct, and states have no business establishing rules of procedure for federal courts.

Both parties seem to place a great deal of importance on the name assigned to Rule 3.10. The Board calls it a rule of professional conduct. Baylson calls it a rule of procedure. But as Shakespeare asked:

> What's in a name? That which we call a rose By any other name would smell as sweet.

For purposes of determining whether Rule 3.10 violates the Supremacy clause, it matters not at all what the Board or Baylson choose to call it. What matters is whether the substance of Rule 3.10 actually conflicts or is incompatible with federal law. *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); *Sperry v. Florida*, 373 U.S. 379, 384, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963).

Under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, when state law conflicts or is incompatible with federal law, the state law is pre-empted by federal law. Pre-emption occurs when Congress explicitly or implicitly

states its intent to regulate a specific area at the exclusion of the states. *Fidelity Federal*, 458 U.S. at 152-153, 102 S.Ct. at 3022. Pre-emption also occurs when the state regulation actually conflicts or is incompatible with federal law. *Fidelity Federal*, 458 U.S. at 153, 102 S.Ct. at 3022; *Sperry*, 373 U.S. at 384, 83 S.Ct. at 1325. Finally, the Supreme Court has made clear that these principles apply even when the area being regulated by federal law is one of special concern to the state. *Fidelity Federal*, 458 U.S. at 153, 102 S.Ct. at 3022; *Ridgway v. Ridgway*, 454 U.S. 46, 54-55, 102 S.Ct. 49, 54, 70 L.Ed.2d 39 (1981); *Sperry*, 373 U.S. at 384, 83 S.Ct. at 1325; *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962).

For example, in *Sperry*, the Florida Bar sued defendant, a nonlawyer, to prevent him from representing clients before the Patent Office. The Florida bar argued that such representation violated Florida Law because it constituted unauthorized practice of law by a nonlawyer. Defendant argued that he was authorized to represent clients before the patent office pursuant to federal regulations which permitted nonlawyers to advise and assist clients in the presentation and prosecution of their applications before the patent office. In support of its position, the Florida Bar argued in part that Florida could prevent defendant from practicing before the Patent Office because of Florida's substantial interest in regulating the practice of law in that state. The Supreme Court disagreed and held that Florida could not prevent a nonlawyer from practicing before the Patent Office, notwithstanding that such activity constituted practice of law in Florida. *Sperry*, 373 U.S. at 385, 83 S.Ct. at 1325. The court reasoned that Florida could not "impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Id.*

Similarly, here, Pennsylvania does have an important interest in regulating the conduct of attorneys licensed

to practice in the state. But "'the law of the state, though enacted in the exercise of powers not controverted, must yield' when incompatible with federal legislation." *Sperry*, 373 U.S. at 384, 83 S.Ct. at 1325, *quoting Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824). Rule 3.10, as written, is simply incompatible with federal grand jury law for two reasons.

First, as we have previously stated in examining the validity of the district court's adoption of Rule 3.10 as a local federal rule, Rule 3.10 is inconsistent with Rule 17 of the Federal Rules of Criminal Procedure. If Rule 3.10 as a local federal rule is inconsistent with Fed.R. Crim.P. 17, it does not suddenly become consistent with Fed.R.Crim.P. 17 as a state rule of professional conduct. In other words, Rule 3.10 violates the Supremacy clause because it is incompatible with Fed.Crim.R.P. 17.

Second, Rule 3.10 purports to impose upon federal grand jury practice a requirement of pre-service judicial review of grand jury subpoenas. Such a requirement, as we have discussed above, is neither contemplated by the Federal Rules nor sanctioned by case precedent. In other words, Rule 3.10 violates the Supremacy Clause because, as the Supreme Court held in *Sperry*, it "imposes upon the performance" of federal grand jury activity "conditions not contemplated by Congress." *Sperry*, 373 U.S. at 385, 83 S.Ct. at 1326.

V

This court is not unmindful of the serious problems associated with the practice of government prosecutors subpoenaing attorneys to testify about past or present clients before grand juries.[4] As the Ninth Circuit has expressed:

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[4] *See* Stern & Hoffman, *Privileged Informers: The Attorney Subpoena problem and a Proposal for Reform*, 136 U.Pa.L.Rev. 1783, 1828 (19—); Zwerling, *Federal Grand Juries v. Attorney Independence and Attorney-Client Privilege*, 27 Hastings L.J. 1263, 1268 (1976); Campbell, *Eliminate the Grand Jury*, 64 J.Crim.L. & Criminology 174 (1973).

> Many feel, and with some justification, that whatever benefit the government derives from this practice comes at the direct expense of the attorney-client relationship. Among the perceived cost, for example, are the potential loss of a client's choice of counsel should the latter be compelled to testify at the trial and the potential chilling effect upon the client's trust in his counsel's loyalty.

United States v. Perry, 857 F.2d 1346, 1347 (9th Cir. 1988).

Moreover, this court is not convinced that the historic powers and functions of the grand jury alone would prevent the adoption of a federal rule requiring government prosecutors to obtain judicial approval before serving a grand jury subpoena on an attorney. While the grand jury has always played a unique role in our system of criminal justice, so too, we believe, has the attorney-client relationship. Justice Jackson said it best: "The lawyer and the law office are an indispensable part of our administration of justice." *Hickman v. Taylor*, 329 U.S. 495, 515, 67 S.Ct. 385, 395, 91 L.Ed. 451 (1947) (Jackson, J., concurring).

But whatever balance which needs to be stricken between the grand jury and the attorney-client relationship, it cannot be achieved by means of the limited power of the federal district and circuit courts to prescribe local rules. We therefore hold that Rule 3.10 may not be enforced against federal prosecutors practicing before the federal district courts for the Eastern, Middle and Western district courts of Pennsylvania because its adoption as federal law falls outside the local rule-making authority of the district court, and because its enforcement as state law violates the Supremacy Clause of the United States Constitution.

We will affirm the decision of the district court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1425

MICHAEL M. BAYLSON
JAMES J. WEST
THOMAS W. CORBETT, JR.

v.

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA
BYRD R. BROWN; JAMES F. MUNDY; MURRAY S. ECKELL; RICHARD D. CILARDI, JR.; JUDITH HEH; JOHN R. PADOVA; JOHN A. TUMOLO; DANIEL R. GILBERT; WILLIAM L. KELLER; GEORGE F. DOUGLAS, JR.; BERLE L. SCHILLER; CHARLES V. STOELKER, JR.; FREDERICK WELLS HILL

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 89-5264)

Present: Mansmann, Cowen and Higginbotham, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel November 21, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 23, 1991, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: September 16, 1992

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

Civ. A. No. 89-5264

MICHAEL M. BAYLSON, JAMES J. WEST
and CHARLES D. SHEEHY

v.

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

April 22, 1991

Michael M. Baylson, U.S. Atty., David F. McComb, Asst. U.S. Atty., Philadelphia, for plaintiffs.

Richard A. Sprague, Thomas A. Sprague, Philadelphia, for defendant.

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

The plaintiffs in this action are members of the Pennsylvania Bar and the United States Attorneys or Acting United States Attorneys for the three districts of Pennsylvania. They seek relief from a state disciplinary rule that impresses an ethical obligation on them, as prosecutors, to obtain judicial approval before subpoenaing any lawyer to give evidence about his or her client to a grand jury. The parties have filed cross-motions for summary judgment. For the reasons that follow, the Court will grant the plaintiffs' motion.

I.

After the advent of the Racketeer Influenced and Corrupt Organizations Act, Pub.L. 98-473, 98 Stat. 1837 (codified as amended at 18 U.S.C. §§ 1961-68), and the Continuing Criminal Enterprise statute, Pub.L. 91-513, 84 Stat. 1265 (codified at 21 U.S.C. § 848), Justice Department officials concluded that attorneys often held non-privileged information pertinent to criminal investigations and thus discarded their previous reticence in subpoenaing them to appear before grand juries. *See* Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U.Pa. L.Rev. 1783, 1786-89 (1988). This revision in policy has inspired a vigorous national debate about the propriety and ramifications of compelling lawyers to testify before investigative bodies. *See, e.g.*, Pierce & Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Target of Investigations*, 36 Hastings L.J. 821 (1985); Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L.Rev. 1091, 1178-79 (1985); Note, *A Critical Appraisel of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 Duke L.J. 145; Note, *Grand Jury Subpoenas of a Target's Attorney: A Need for a Preliminary Showing*, 22 Ga.L.Rev. 747 (1986); *Lawyer Cited for Contempt Over Fee Data*, N.Y. Times, Apr. 18, 1991, at B1, col. 5; *Thornburgh Policy Leads to a Sharp Ethics Battle*, N.Y. Times, Mar. 1, 1991, at B4, col. 3; *New Rule Set on Lawyer Subpoenas*, Nat'l L.J., Nov. 4, 1985, at 3, 42. It also has motivated some state and federal courts to devise disciplinary rules that require prosecutors to secure judicial approval before subpoenaing attorneys. D.Mass.R. 5(d)(4)(B); Mass.S.J.C.R. 3:08 (PF 15); Tenn.Ct.R.DR 7-103; Va. S.Ct.R. 3A:12 (codified as DR 8-102(A)). This roster now includes the Supreme Court of Pennsylvania, which

has enacted Rule 3.10 of the Rules of Professional Conduct. The Rule provides:

> A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness. Adopted Nov. 7, 1988, effective Nov. 26, 1988.

COMMENT

> It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6 [concerning confidentiality of information], the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

Although various statutes and the Federal Rules of Procedure constitute the primary means for regulating practice in the federal district courts, the judges of each district are authorized to promulgate and amend local rules of practice. 28 U.S.C. § 2071(a); Fed.R.Civ.P. 83; Fed.R.Crim.P. 57. Pursuant to this rulemaking power, all three federal district courts situated in Pennsylvania ostensibly revised their local rules to state in terms that Rule 3.10 had no application in their respective jurisdictions. Local Rule 22 of the United States District Court

for the Western District of Pennsylvania provides that the "Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by the state court, except as otherwise provided by specific rule of this court." W.D.Pa.R.P. 22(I)(B). On March 11, 1989, the Court issued an Order provisionally expunging Rule 3.10 from its Local Rules:

> Rule 3.10 of the Rules of Professional Conduct, adopted by the Supreme Court of Pennsylvania and effective November 26, 1988, shall be and hereby is deleted as a rule of this court.
>
> COMMENT: The Board of Judges concludes that Rule 3.10 of the Rules of Professional Conduct, adopted by the Supreme Court of Pennsylvania, imposes an unnecessary and unreasonable burden on the Department of Justice and this court. Federal law and existing practice provide defense counsel and their clients with standing to raise justiciable issues in appropriate cases following the issuance of a grand jury subpoena. The Clerk of Court is directed to comply with Rule 73 of the Rules of Civil Procedure forthwith and the order shall take effect 60 days thereafter, unless otherwise ordered by the court.

On May 17, 1989, the judges of the Western District signed an Order formally integrating the exception into Local Rule 22. Similarly, the Middle District amended its Local Rule 304.2 to read: "The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, except Rule 3.10, as amended from time to time by that court, unless specifically excepted in this court's rules." Eastern District Local Rule of Civil Procedure 14, applicable to criminal proceedings pursuant to Local Rule of Criminal Procedure 2, provides that

> The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state, except that prior court approval as a condition to the issuance of a subpoena addressed to an attorney in any criminal proceeding, including a grand jury, shall not be required. The propriety of such a subpoena may be considered on a motion to quash.
>
> Amended May 23, 1990.

E.D.Pa.R.Civ.P. 14(IV)(B).

The plaintiffs instituted this action to prevent the defendant, the Disciplinary Board of the Supreme Court of Pennsylvania, from enforcing Rule 3.10 against them and other federal prosecutors who are members of the Pennsylvania Bar. Created in 1972, the Disciplinary Board is an eleven member body that serves under the direction of the Pennsylvania Supreme Court and is charged with administering the state's Rules of Professional Conduct. Pa.R.D.E. 102(a), 201, & 205(a). The Board may commence an investigation into alleged attorney misconduct either on its own motion or in response to a complaint filed by any person. Pa.R.D.E. 205(c)(1) & 208(a)(1). Generally speaking, formal disciplinary proceedings against an attorney are conducted before a Board-appointed hearing committee, Pa.R.D.E. 205(c)(3) & (5), which, after receiving evidence and entertaining argument, submits to the Board a recommended disposition of the matter. The Board, after review of the committee's report, prepares its own statement of findings and recommendations, which is forwarded to the Supreme Court. Pa.R.D.E. 205(c)(6) & 208(d)(2).

According to the plaintiffs' complaint, because the district courts' amendments deleting Rule 3.10 from the

local rules are federal laws and therefore supreme, they cannot be sanctioned for failing to secure prior judicial approval of attorney subpoenas. The plaintiffs also argue, among other things, that Rule 3.10 conflicts with the Federal Rules, violates article II of the Constitution by infringing on their executive duties to investigate criminal wrongdoing and to enforce federal laws, and interferes with the judiciary's article III powers to supervise federal grand juries. Both parties initially moved for judgment on the pleadings. The defendant asserted various reasons in support of its motion, including comity, justiciability, and failure to join an indispensable party. The plaintiffs, on the other hand, thought that the district courts' exceptions to Rule 3.10 in the local rules entitled them to judgment. The Court denied both motions, primarily because there were conflicting factual allegations regarding the procedural validity of the district courts' revisions to their local rules. Resolution of that question, in the Court's view, dictates whether other issues of potentially constitutional dimension need be reached. In other words, even though some grounds raised by the plainitffs could have been disposed of on the pleadings, notions of judicial restraint required that the Court consider the local rules dispute first because it comprised the narrowest possible nonconstitutional ground upon which a decision could rest. *See Harris v. McRae*, 448 U.S. 297, 306-07, 100 S.Ct. 2671, 2683, 65 L.Ed.2d 784 (1980); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944). Thus, the Court directed that discovery be had.

The parties now have filed cross-motions for summary judgment. The plaintiffs urge the Court to hold that valid Local Rules exempt them from Rule 3.10's operation and that Rule 3.10 is inconsistent with the Federal Rules of Criminal Procedure and the Constitution. The Disciplinary Board, having abandoned the threshold arguments it asserted earlier and agreeing the case is ripe for disposition, contends that the district courts' amend-

ments deleting Rule 3.10 are unsound for lack of appropriate notice and comment. Because, as a result, Rule 3.10 has been incorporated into federal law by the local rules of disciplinary enforcement and because it does not conflict with any Federal Rule, statute, or constitutional provision, the defendant concludes, the plaintiffs are not at liberty to disregard the obligations that Rule 3.10 imposes.

II.

Individual federal courts have possessed, from their inception, rulemaking authority in some form. *See* Act of March 2, 1793, Ch. 22, § 7, 1 Stat. 33; Note, *Rule 83 and the Local Federal Rules*, 67 Colum.L.Rev. 1251, 1253-54 (1967). As indicated earlier, 28 U.S.C. § 2071, Fed. R.Civ.P. 83, and Fed.R.Crim.P. 57 currently permit each district court to make and amend local rules of practice. *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163 (3d Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975). These enabling provisions restrict the district court's power to do so, however, in important respects. The court may establish or revise local rules only after providing appropriate public notice and an opportunity to comment. 28 U.S.C. § 2071(b); *Tiedel v. Northwestern Michigan College*, 865 F.2d 88, 91 (6th Cir. 1988). This limitation, which was imposed by a 1985 amendment to the Federal Rules and by the Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100-702, 102 Stat. 4642 (codified in relevant part at 28 U.S.C. §§ 2071-77), is designed to ensure that local rules, like administrative regulations, are subject to public scrutiny and are formulated with the advice of those whom the rules affect. H.R.Rep. No. 422, 99th Cong., 1st Sess. 14-15, 18, 29 (1985); Fed.R.Civ.P. 83 advisory comm. note; Fed.R.Crim.P. 57 advisory comm. note; Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act*, 123 F.R.D. 399, 409-10 (1989). Local rules that are not drafted pursuant to the notice

and comment procedures are invalid. *See* 28 U.S.C. § 2071(b); Fed.R.Civ.P. 83 ("A local rule *so adopted* shall take effect . . ." (emphasis added)); Fed.R.Crim.P. 57; 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 83.02, at 83-6 (1990) ("Assuming that the public notice and opportunity to comment provisions have been satisfied, the rule or amendment will become effective on the date specified by the district court."); *see also* Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 Colum.L.Rev. 905, 953 (1976). If there is "an immediate need," a court may dispense with notice and comment before implementing a rule, provided that it gives notice and an opportunity to comment "promptly thereafter." 28 U.S.C. § 2071(e). In addition, the Judicial Improvements Act, which places more rigorous controls on court rulemaking than do the Federal Rules of Procedure, mandates that in promulgating local rules each district court "shall" utilize an advisory committee, which should include members of the bar and which must make recommendations to the court. 28 U.S.C. § 2077(b); H.R.Rep. No. 422, 99th Cong., 1st Sess. 28 (1985) ("All lower Federal courts are required to use advisory committees as well as notice and comment."); Siegel, *Practice Commentary, reprinted in* 28 U.S.C.A. foll. § 2077 (1990 Supp.).

Neither the Federal Rules nor section 2071 fix the precise manner in which public notice must be disseminated and opportunity for comment afforded. The Advisory Committee's note on Fed.R.Civ.P. 83 states, "The amended Rule does not detail the procedure for giving notice and an opportunity to be heard since conditions vary from district to district. Thus, there is no explicit requirement for a public hearing, although a district may consider that procedure appropriate in all or some rulemaking situations." A district court similarly enjoys "considerable latitude" in calibrating its public notice method to the individual needs of its jurisdiction.

7 J. Moore & J. Lucas, *supra*, ¶ 83.02, at 83-5. "For example, the court may choose to publish the proposed rule or amendment in the advance sheets, mail notice to members of its bar or submit copies to bar and other professional organizations." *Id.* ¶ 83.02, at 83-6. A court also, rather than incur the expense of publication, may issue press releases describing proposed rule changes and inviting comment. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Memorandum to United States District Court Judges, Jan. 30, 1989, at 2.

Although the pertinent statutes, Federal Rules, and legislative history explain that the notice and comment requirement is a flexible one, those sources do not define what information the notice itself must convey. Some guidance may be found in the Administrative Procedure Act. 5 U.S.C. § 551 *et seq.* To be deemed adequate under the APA, an agency's notice of rulemaking must advise the public of the terms or substance of the proposed rule or describe the subjects or issues implicated by the contemplated action. 5 U.S.C. § 553(b); S.Rep. No. 248, 79th Cong., 2d Sess. 200 (1946) ("Agency notice must be sufficient to fairly appraise interested parties of the issues involved, so that they may present responsive data or argument relating thereto."); *United States v. Florida E. Coast R. Co.*, 410 U.S. 224, 243-44, 93 S.Ct. 810, 820, 35 L.Ed.2d 223 (1973); *Associated Builders and Contractors, Inc. v. Brock*, 862 F.2d 63, 67 (3d Cir.1988); *Simmons v. I.C.C.*, 757 F.2d 296, 300 (D.C.Cir.1985); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir.1977). The notice also must specify the time, place, and nature of the comment procedure to be employed. 5 U.S.C. § 553(b); 1 K. Davis, *Administrative Law Treatise* § 6:25, at 571-72 (2d ed. 1978). The underlying purpose of the Judicial Improvements Act and the amendments to Fed.R.Crim.P. 57 and Fed.R.Civ.P. 83 justifies importing these easily met requisites into the district court rulemaking context. After all, those pro-

visions are intended to ensure that the legal profession and interested members of the public have an opportunity to be heard. H.R. Rep. No. 422, 99th Cong., 1st Sess. 14-15, 18, 29 (1985); Fed.R.Civ.P. 83 advisory comm. note; Fed.R.Crim.P. 57 advisory comm. note; Siegel, *supra*, 123 F.R.D. 399, 409-10 (1989); Weinstein, *supra*, 76 Colum.L.Rev. at 963-64. That end obviously would be frustrated if a court's notice of rulemaking failed to disclose the subject matter of the anticipated local rule or the manner in which comments could be presented.

The plaintiffs contend at the outset that this Court cannot pass on the procedural validity of the local rules at issue. Instead, they maintain, the Judicial Improvements Act and the Federal Rules vest exclusive authority to do so in the Judicial Council of the Circuit. The plaintiffs are mistaken. Because Congress was discontent with the proliferation of local rules that conflicted "with the letter and the spirit" of rules of national applicability, H.R.Rep. No. 422, 99th Cong., 1st Sess. 15, 27-28 (1985); *see also* H.R.Rep. No. 889, 100th Cong., 1st Sess. 27, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 5988, the Judicial Improvements Act requires the Judicial Council of each Circuit to review periodically the local rules implemented by the district courts within its purview for consistency with the Federal Rules. 28 U.S.C. § 332(d)(4). Not only did Congress empower the Council to "modify or abrogate" any local rule found inconsistent with national practice or procedure, 28 U.S.C. § 332(d)(4), it significantly altered the nature of its review. "This test for inconsistency should *not*, however, be whether the deviation made by the local rule from the general rule is 'outcome determinative[.'] [R]ather, the test should be whether the local rule can co-exist with the general rule without negating the purpose of the general rule." H.R.Rep. No. 422, 99th Cong., 1st Sess. 27 (1985) (quoting *Colgrove*

v. Battin, 413 U.S. 149, 164 n. 23, 93 S.Ct. 2448, 2456 n. 23, 37 L.Ed.2d 522 (1973)).

Courts regularly have entertained challenges to local rules on a variety of grounds, *see, e.g., Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981); *Frangos v. Doering Equip. Corp.*, 860 F.2d 70 (3d Cir.1988); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (3d Cir.1988); *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140 (1st Cir.1976); *Brewster v. North Am. Van Lines, Inc.*, 461 F.2d 649 (7th Cir. 1972), including that procedural requisites were not satisfied. *Miner v. Atlass*, 363 U.S. 641, 650, 80 S.Ct. 1300, 1306, 4 L.Ed.2d 1462 (1960); *Horner Equip. Int'l v. Seascape Pool Center, Inc.*, 884 F.2d 89, 94 & n. 18 (3d Cir.1989); *United States v. Klubock*, 832 F.2d 664, 666 (1st Cir.1987) (in banc) (notice and comment); *id.* at 671-75 (Breyer, J., dissenting) (same); *United States v. Columbia Broadcasting Sys., Inc.*, 497 F.2d 102, 103 n. 3 (5th Cir.1974); *see Smith v. Oelenschlager*, 845 F.2d 1182, 1183-84 (3d Cir.1988). Nothing in the language of the Federal Rules or section 332 evinces a newly devised intent to divest the judiciary of that long-standing authority, and no case has ever intimated to the contrary. As the legislative history explicitly reveals, the Judicial Councils and the courts share the power of review. "Of course, local rules may be found improper by a court in a court proceeding." H.R. Rep. No. 422, 99th Cong., 1st Sess. 28 (1985). Further, section 2073, which establishes the method for promulgating Rules of Procedure and Evidence under section 2072, states that procedural deficiencies do not render such Rules invalid. 28 U.S.C. § 2073(e) ("Failure to comply with this section does not invalidate a rule prescribed under section 2072 of this title."). Its purpose is "to avoid litigation about the propriety of a rule when the only alleged invalidity is non-compliance with one of the procedural requirements" stated in section 2073. H.R.Rep. No. 422, 99th Cong.,

1st Sess. 26 (1985). The absence of a parallel provision regarding district court rulemaking under section 2071 is additional proof that Congress did not immunize local rules from judicial examination for procedural regularity.

Turning to the substance of the defendant's attack on the amendments to the three local disciplinary rules, the Court agrees that the district courts did not follow appropriate notice and comment rulemaking procedures. The uncontroverted facts disclose that on February 6, 1989, the judges of the Eastern District voted unanimously [1] to remove Rule 3.10 from Local Rule 14. Subsequently, on March 14, 1989, the judges formally determined that prior notice and comment could be dispensed with because there was an immediate need for the exception. 28 U.S.C. § 2071(e). On May 23, 1990, the Chief Judge of the Eastern District signed an Order amending Rule 14 to state in terms that court approval as a precondition to the issuance of a subpoena was not required. The Clerk of the Court then sent copies of revised Rule 14 to all attorneys registered on the local rules mailing list. No notice soliciting comment accompanied the distribution, and no such notice was circulated afterward. Although the record submitted by the parties is far from clear on the point, at least one judge of the Eatsern District discussed the amendment to Local Rule 14 with attorneys at a Bench Bar conference.

On January 20, 1989, the judges of the Middle District voted to extirpate Rule 3.10 from its Local Rule 304.2. The decision was without dissent. In early March, the Clerk of Court issued a press release, which read:

> The Judges of this court recently approved a modification of Local Rule 304.2. That rule applies the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania to all attorneys ad-

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[1] In the Eastern District, senior judges do not vote on proposed local rules or amendments.

> mitted to practice before the Middle District. The modification excepts Rule 3.10 of the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania from being applied in this court.

The press release was dispatched to various legal publications in the District. No other notice was disseminated, and no comments were ever lodged with the Court.

On March 21, 1989, the judges of the Western District approved, also unanimously, an Order declaring that Rule 3.10 "shall be and hereby is deleted as rule of this court." *See supra* at 331-332. The Order itself stated that it was not to take effect until sixty days later. The mandate then was published in the *Pittsburgh Law Journal*. On April 24, 1989, the Clerk of Court advised the Chief Judge of the Western District that "[t]he time for public comment on the proposed amendment of Local Rule 22(B) has passed, and no comments have been received. I have, therefore, prepared the attached Order for your consideration and approval." At a meeting held on May 17, 1989, the judges of the Court formally acted to expunge the state bar provision from Local Rule 22.

The putative revisions share two defects. First, the district courts did not utilize advisory committees at any stage in promulgating the amendments. Second, the notices distributed by the districts did not solicit comment or explain where, how, or when interested individuals could be heard regarding the deletion of Rule 3.10 from the local rules. With the exception of the Western District's Order of March 21, the notices also give every impression that the Courts were simply announcing their final decisions, rather than inviting input. That no individuals (apart from the United States Attorneys) and only one organization in the entire Commonwealth submitted comment about the amendments confirms this conclusion. Nor does the Court find persuasive the plaintiffs' argument that discussion of the attorney subpoena controversy at a Bench Bar conference satisfied the East-

ern District's statutory obligation to afford notice and an opportunity to comment. Undoubtedly, a properly announced, open meeting between judges and interested individuals to debate the merits of a particular rule would discharge section 2071(a)'s notice and comment requirement. In this case, however, there is no evidence that the agenda of the Bench Bar conference was adequately noticed, or that the public or even all interested lawyers in the District were invited to attend the discussion. Accordingly, the three amendments are invalid.

III.

A.

As explained previously, Eastern District Civil Rule 14, Middle District Rule 304, and Western District Rule 22 adopt the Rules of Professional Conduct enacted by the Supreme Court of Pennsylvania as the ethical standards that attorneys must obey when practicing in the district courts. The defendant argues that once the defective exceptions to Rule 3.10 are excised, the local rules incorporate all of Pennsylvania's Rules of Professional Conduct, including 3.10. The Disciplinary Board is correct in its assertion that when an amendment to an existing local rule has not been perfected, the original rule remains in force. *United States v. Diaz-Villafane*, 874 F.2d 43, 45 (1st Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 177, 107 L.Ed.2d 133 (1989). The defendant also is right to say that insofar as the district courts have adopted it, Rule 3.10 is a federal law. *See United States v. Klubock*, 832 F.2d 649, 651 (1st Cir.1986), *reinstated in relevant part by equally divided court*, 832 F.2d 664, 668 (1st Cir.1987) (in banc).

The Court concludes, however, that the pertinent local rules themselves implicitly reject the absorption of Rule 3.10 and that Rule 3.10 is not compatible with the Federal Rules of Criminal Procedure or well-settled grand

jury practice. These issues are interrelated. Local rules that are in conflict with the Federal Rules or Acts of Congress are nullities. 28 U.S.C. § 2071; Fed.R.Crim.P. 57; *Frazier*, 482 U.S. at 646, 107 S.Ct. at 2611; *Lasky v. Continental Products Corp.*, 804 F.2d 250, 255 (3d Cir.1986); *United States v. Statchuk*, 682 F.2d 466, 467 (4th Cir.1982). If the Court were to interpret the three local rules in question as requiring judicial scrutiny of grand jury subpoenas directed to attorneys before they are served, it would have to declare that portion of them to be inconsistent with the Rules of Criminal Procedure. Because statutes or rules should be construed in a manner that renders them compatible with one another, implying exceptions to Rule 3.10 in the local rules is warranted. *United States v. Lopez-Cavasos*, 915 F.2d 474, 479 (9th Cir.1990). In any event, whether the local rules displace Rule 3.10 by implication or the Federal Rules forbid integration of Rule 3.10 into the local rules, the result is the same. Preservice judicial review of grand jury subpoenas addressed to attorneys is neither available nor permitted in the federal district courts of Pennsylvania. There are several reasons for this.

First, the local disciplinary rules are designed to regulate "the conduct of attorneys" who practice before the district courts. E.D.Pa.Civ.R. 14; W.D.Pa.R. 22; *see* M.D.Pa.R. 304.1. "Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Rules of Professional Conduct adopted by this Court shall constitute misconduct and shall be grounds for discipline." E.D. R.Civ.P. 14(IV)(B). *Accord*, M.D.Pa.R.P. 304.2; W.D.Pa.R.P. 22(I)(B). Plainly, the language, purpose, and structure of these local disciplinary rules do not contemplate the modification of practice outside the context of defining professional standards for lawyers appearing before the district courts or establishing methods by which to adjudicate claimed breaches of those norms. "[T]he Code [of Professional Responsibility] does not delineate rules of evidence, but only sets forth

strictures on attorney conduct." *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp.*, 546 F.2d 530, 539 (3d Cir.1976), *cert. denied*, 430 U.S. 984, 97 S.Ct. 1681, 52 L.Ed.2d 378 (1977). Although Rule 3.10 does perhaps implicate "latent" ethical concerns, *United States v. Klubock*, 832 F.2d at 653, it also is a rule of criminal procedure that imposes a concomitant restraint on the actions of courts and federal grand juries. As the Rule and its comment attest, Rule 3.10 is only nominally addressed to the conduct of government attorneys. It requires as a predicate the erection of novel court procedures and interjects an additional layer of judicial supervision over the grand jury subpoena process. It commands the court to evaluate five factors to ascertain whether service of an attorney subpoena is proper. Stated another way, Rule 3.10 initially creates a rule of criminal procedure that contains evidentiary standards for judicial review and then impresses an ethical duty upon prosecutors to adhere to that procedure. *See* Sheridan, *Grand Jury Subpoenas to Criminal Defense Attorneys: Massachusetts Restrains the Federal Prosecutor Through an "Ethical" Rule*, 2 Geo. J. Legal Ethics 485, 519 (1988). As a matter of principle and taxonomy, that antecedent component of Rule 3.10 bears no relation to the interests which animated the adoption of the local rules of disciplinary enforcement.

Second, the Court takes into account the district courts' failed attempts to expunge Rule 3.10 from their local rules. Although infirm, those provisions are instructive about how the judges viewed the operation of their own procedures that were in effect before the amendments were drafted. *Cf. Diaz-Villafane*, 874 F.2d at 46. The Western District's Order of March 11, 1989 deemed Rule 3.10 both "unreasonable" and "unnecessary" in light of existing federal law and practice that permit attorneys to challenge subpoenas after their issuance and service. Likewise, the Eastern District's amendment to R.Civ. P. 14(IV)(B) reaffirmed the propriety of moving to

quash illegitimate subponeas. This language suggests that the judges of those Courts considered Rule 3.10 to be redundant with their procedures at best and inconsistent with them at worst. *See* Dep. of M. Kunz, Nov. 6, 1990, at 30-31 (Def. Mem., Dec. 17, 1990, Ex. A); Dep. of Hon. D. Ziegler, Nov. 13, 1990, at 17-18, 25 (Def.Mem., Dec. 17, 1990, Ex. E); *see also In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 250 n. 7 (2d Cir.) (in banc), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986). It further betrays the fair amount of irony embedded in the Disciplinary Board's position. The defendant contends, correctly enough, that the exemptions are invalid for lack of appropriate notice and opportunity to comment. Yet it goes on to argue that as a consequence the district courts have adopted the more imposing and far-reaching alteration of practice represented by Rule 3.10, even though that too was done without notice or comment in the district courts and even though those amendments simply endeavored to state expressly what is implicit in the local rules and in the Federal Rules of Criminal Procedure.

Third, engrafting Rule 3.10 onto the three district courts' local disciplinary rules would place them in conflict with Federal Rule of Criminal Procedure 6(e), as supplemented by local rules calculated to protect the secrecy of grand jury proceedings. E.D.Pa.R.Crim.P. 4 & 12; M.D.Pa.R. 117 & 120; W.D.Pa.R. 32. Rule 6(e) generally prohibits disclosure of "matters occurring before the grand jury." *See In re Grand Jury Investigation (DiLoreto)*, 903 F.2d 180, 181-82 (3d Cir.1990); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 63-64 (3d Cir.1982); *In re Grand Jury Investigation (Appeal of New Jersey State Comm'n of Investigation)*, 630 F.2d 996, 1000 (3d Cir.1980), *cert. denied sub nom. Rittenhouse Consulting Enter. Ltd. v. New Jersey State Comm'n of Investigation*, 449 U.S. 1081, 101 S.Ct. 865, 66 L.Ed.2d 805 (1981). This policy of secrecy, which is "older than our Nation itself," *Pittsburgh Plate Glass Co. v. United*

States, 360 U.S. 395, 399, 79 S.Ct. 1237, 1241, 3 L.Ed.2d 1323 (1959), and which is integral to maintaining "the proper functioning of our grand jury system," *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218, 99 S.Ct. 1667, 1672, 60 L.Ed.2d 156 (1979), is not to be abridged lightly. "In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand jury] secrecy has been authorized." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425, 103 S.Ct. 3133, 3138, 77 L.Ed.2d 743 (1983). *Accord Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 572, 103 S.Ct. 1356, 1364, 75 L.Ed.2d 281 (1983) ("Congress, of course, has the power to modify the rule of secrecy by changing the showing of need required for particular categories of litigants. But the rule is so important, and so deeply-rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so."); *Pittsburgh Nat'l Bank v. United States*, 771 F.2d 73, 77 (3d Cir.1985). Preserving the confidentiality of grand jury proceedings furthers several ends. It prevents the flight of those who might be indicted, allows "the utmost freedom to the grand jury in its deliberations," guards against witness and jury tampering, facilitates "free and untrammeled disclosures by person who have information with respect to the commission of crimes," *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n. 6, 78 S.Ct. 983, 986 n. 6, 2 L.Ed.2d 1077 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)), and ensures that "persons who are accused but exonerated by the grand jury" are not stigmatized for having been the focus of a criminal investigation or otherwise subjected to public ridicule. *Douglas Oil Co.*, 441 U.S. at 219, 99 S.Ct. at 1673.

In *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Supreme Court held that a trial subpoena duces tecum issued under Federal Rule of Criminal Procedure 17(c) is not "unreasonable or

oppressive" if the party seeking to avoid quashal establishes three elements: relevancy, admissibility, and specificity. *Id.* at 699-700, 94 S.Ct. at 3103. Stated more fully, the party resisting the motion to quash or modify the trial subpoena must demonstrate that the documents sought are "evidentiary" and "relevant," that they are "not otherwise procurable reasonably in advance of trial by exercise of due diligence," that the party "cannot properly prepare for trial" without prior production of the documents, and that "the application is made in good faith and is not intended as a general 'fishing expedition.' " *Id.* The requisites to judicial approval of grand jury subpoenas enunciated in Rule 3.10 substantially overlap with, and indeed are more exacting than those developed in *Nixon*. The commentary to Rule 3.10 indicates that a court ordinarily should not authorize the service of a grand jury subpoena directed to an attorney unless it finds that the information sought is "relevant to the proceeding," that there is "no other feasible alternative" avenue by which to obtain the information, that compliance with the subpoena would not be "unreasonable or oppressive," that the purpose of the subpoena is "not primarily to harass" the attorney or his or her client, and that the evidence is not protected by Professional Conduct Rule 1.6, privilege, or the work product doctrine.

The Supreme Court specifically has forbidden application of the *Nixon* test to grand jury subpoenas, however, because it impairs the "strict secrecy" in which Rule 6(e) cloaks grand jury proceedings. *United States v. R. Enterprises, Inc.*, —— U.S. ——, ——, 111 S.Ct. 722, 726-27, 112 L.Ed.2d 795 (1991). "Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise 'the indispensable secrecy of grand jury proceedings.' Broad disclosure also affords the targets of investigation far more information about the grand jury's internal workings than the Rules of Criminal Procedure appear to con-

template." *Id.* at ——, 111 S.Ct. at 727 (quoting *United States v. Johnson*, 319 U.S. 503, 513, 63 S.Ct. 1233, 1238, 87 L.Ed. 1546 (1943)). *Accord In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d at 248 (compelling Government to make preliminary showing that it has need for evidence sought by subpoena and that attorney is only source of that evidence "would seriously jeopardize the secrecy" of grand jury proceedings); *Matter of Sinadinos*, 760 F.2d 167, 170 (7th Cir.1985). Rule 3.10 suffers from this infirmity even more acutely. It does not merely force the Government to disgorge the same type of information that the Supreme Court has deemed to endanger the integrity of the grand jury process. It further requires the disclosure of additional matters and mandates that this be done in every instance in which a subpoena commands an attorney to give evidence about a client and before the subpoena may even be served.[2]

Because Rule 3.10 does not provide explicitly whether judicial review necessitates an ex parte or an adversary hearing, one answer to the foregoing objection might be that it requires only the former, which perhaps would diminish the peril of unauthorized disclosure. That construction of the Rule gives rise to other difficulties. "The value of a judicial proceeding . . . is substantially diluted where the process is *ex parte* because the court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties

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[2] The defendant contended at oral argument that whether Rule 3.10 constitutes an impermissible burden on the federal grand jury is a question of fact precluding the entry of summary judgment in favor of the plaintiffs. That is not so. The issue here—as in *R. Enterprises, In re Grand Jury Matter (Backiel)*, 906 F.2d 78 (3d Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 509, 112 L.Ed.2d 521 (1990), and the other cases discussed in the text—is whether the pre-service judicial screening mechanism and the particular legal standards used to test the propriety of grand jury subpoenas are consistent with the Federal Rules of Procedure, privilege law, and the historic function of the grand jury. As the caselaw amply demonstrates, the bulk of Rule 3.10 is at odds with all three.

may participate." *Carroll v. Princess Anne*, 393 U.S. 175, 183, 89 S.Ct. 347, 352-53, 21 L.Ed.2d 325 (1968). *Accord Nixon*, 418 U.S. at 709, 94 S.Ct. at 3108 ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."). Thus, unless decisionmaking transpires in an adversarial (although presumably in camera) setting, the procedure established under Rule 3.10 would not be able to supply courts with an adequate record upon which to render a meaningful decree or achieve its goal of extending "[a]ny non-illusory, actual protection" to attorneys and their clients. Sheridan, *supra*, 2 Geo. J. Legal Ethics at 498; *see* Stern & Hoffman, *supra*, 136 U.Pa.L.Rev. at 1824. Moreover, to authorize service of an attorney subpoena under Rule 3.10, the court must conclude that the information sought is not shielded from disclosure by Rule 1.6, privilege, or the work product doctrine. In many cases, only the attorney who is the subject of the subpoena or her client will be in custody of the facts needed to make those determinations. *See United States v. Bump*, 605 F.2d 548, 551 (10th Cir.1979); *United States v. Alvarez*, 519 F.2d 1036, 1047 (3d Cir.1975); Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 Am.Crim.L.Rev. 95, 107 (1985). Excluding the subpoenaed lawyer from the hearing also effectively would shift to the Government the burden of proving to the court's satisfaction the elaborate negative that the materials or information sought are not covered by the attorney-client privilege. *See Alvarez*, 519 F.2d at 1047; *United States v. Bump*, 605 F.2d at 551; *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224, 1233-35 (3d Cir. 1979). That, of course, may not be done. *See R. Enterprises*, —— U.S. at ——, 111 S.Ct. at 728; *Matter of Walsh*, 623 F.2d 489, 493 (7th Cir.), *cert. denied*, 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980); *United States v. (Under Seal)*, 748 F.2d 871,

876 (4th Cir.1984); *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469 (3d Cir.1979).

In any event, whether applications for approval of attorney subpoenas are submitted ex parte or are subject to adversarial testing, Rule 3.10 is nevertheless incompatible with the historic powers and function of the grand jury in two respects. First, the Supreme Court's additional reason for declaring that the *Nixon* standard cannot be imported into the grand jury context equally forbids Rule 3.10's incorporation into federal procedure. "The multifactor test announced in *Nixon* would invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena. We have expressly stated that grand jury proceedings should be free of such delays." *R. Enterprise, Inc.*, —— U.S. at ——, 111 S.Ct. at 726-27. Because the effectiveness of the criminal justice system often "hinges on swift action," H.R.Rep. No. 1064, 96th Cong., 2d Sess. 12 (1980), disruption of the grand jury process is far from an idle concern. When the grand jury is "investigating crimes such as highly mobile drug trafficking or ongoing crimes which endanger the health and safety of the public," the imposition of delay "may be intolerable." *Id.* By commanding a more searching inquiry than *Nixon* does and ordaining that review be undertaken without motion, Rule 3.10 would engender interruptions of substantially greater duration and frequency than those condemned by the Court. Indeed, because Rule 3.10 does not and cannot displace the procedure to quash subpoenas duces tecum established by Fed.R.Crim.P. 17, subpoenas may be twice reviewed by courts before the grand jury is allowed to consider the evidence it seeks.[3]

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[3] A court's prior determination that a grand jury subpoena meets the standards of Rule 3.10 would preclude relitigation of the controversy during a later Rule 17(c) motion only if the attorney to whom the subpoena is addressed was permitted to take part in

Second, by interposing impermissible substantive restraints on the grand jury's ability to gather evidence, Rule 3.10 subverts the authority and autonomy of the grand jury system. As the Supreme Court has explained:

> Traditionally, the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."

United States v. Calandra, 414 U.S. 338, 349-50, 94 S.Ct. 613, 620-21, 38 L.Ed.2d 561 (1974) (quoting *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919)). *Accord Sells Eng'g, Inc.*, 463 U.S. at 423, 103 S.Ct. at 3137 (stating that the grand jury "has always been extended extraordinary powers of investigation and great responsibility for directing its own efforts."); *United States v. Mandujano*, 425 U.S. 564, 571, 96 S.Ct. 1768, 1774, 48 L.Ed.2d 212 (1976); *Pittsburgh Plate Glass Co.*, 360 U.S. at 399-400, 79 S.Ct. at 1241; *In re Grand Jury Matter (Appeal of District Council 33)*, 770 F.2d 36, 40 (3d Cir.) (referring to the "tremendous breadth of the grand jury's investigatory powers."), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 558 (1985). Of course, Rule 3.10 does not pur-

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the first set of proceedings. Allowing the attorney to do so, however, would violate Rule 6(e).

port to visit any burdens squarely on the grand jury. Yet, by hampering the prosecutor who serves as its primary agent and advisor, the Rule does so by indirection. "The prosecutor ordinarily brings matters to the attention of the grand jury and gathers the evidence required for the jury's consideration. Although the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on" the United States Attorney's office "to secure the evidence or witnesses it requires," *Sells Eng'g, Inc.*, 463 U.S. at 430, 103 S.Ct. at 3141, and to "draw up and supervise the execution of subpoenas." *Id.* at 430 n. 13, 103 S.Ct. at 3141 n. 13; *see United States v. Martino*, 825 F.2d 754, 761 (3d Cir.1987); *Doe v. DiGenova*, 779 F.2d 74, 80 (D.C.Cir. 1985); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 90 (3d Cir.1973). Depriving the grand jury of this vital assistance doubtless would render it "much less effective" in performing its essential tasks, *Sells Eng'g, Inc.*, 463 U.S. at 430, 103 S.Ct. at 3141, for "[w]ithout thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution." *Id.* at 424, 103 S.Ct. at 3138.

The Third Circuit has expressed strong disapproval of virtually every aspect of Rule 3.10. In *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3d Cir. 1973), a prospective witness had refused to comply with a grand jury subpoena. The United States filed an application to enforce the subpoena under 28 U.S.C. § 1826(a), which constituted its only means to exact compliance. The Court held that when a district court is moved to issue coercive process under that section, it should require the Government to make a minimum showing by affidavit that the information demanded is relevant to an investigation properly within the grand jury's jurisdiction and is not sought primarily for another purpose. *Id.* at 93. *Accord In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 966 (3d Cir.), *cert. denied*, 421 U.S. 1015, 95

S.Ct. 2424, 44 L.Ed.2d 685 (1975). The Third Circuit has made clear, however, that *Schofield I* "did not deal with procedural safeguards surrounding the issuance of grand jury subpoenas," *United States v. Oliva*, 611 F.2d 23, 25 (3d Cir.1979), and did "not purport to encompass the appropriateness of an *appearance* before the grand jury." *In re Grand Jury Proceedings (Appeal of McNabb)*, 658 F.2d 211, 213 (3d Cir.1981) (emphasis in original). Rather, because *Schofield I* addressed "the procedure appropriate to enforcement proceedings," it is the Government's initiation of an action under section 1826(a) or the filing of a motion to quash under Rule 17, "not the issuance of the subpoena" itself, that comprises "the triggering event for the affidavit requirement." *Oliva*, 611 F.2d at 25. *Accord McNabb*, 658 F.2d at 215 & n.3; *Appeal of Hughes*, 633 F.2d 282, 287 (3d Cir. 1980). Further, the *Schofield* regime, unlike Rule 3.10, does "not intend to impede the grand jury process by requiring hearings in every case," *Schofield II*, 507 F 2d at 966, and it plainly does not impose the same magnitude of encumbrances on the grand jury or the Government as Rule 3.10 does. *See Backiel*, 906 F.2d at 87-88; *McNabb*, 658 F.2d at 214-15.

Thus, in *McNabb*, the Third Circuit rejected a contemnor's assertion that he could not be compelled to appear and testify before a grand jury until the Government had made an initial *Schofield*-type showing of reasonableness, relevance, and propriety. After stating that a putative witness cannot invoke the protections of *Schofield* before he or she has even shown up to testify, 658 F.2d at 213, the Court labelled McNabb's suggested series of requirements "dysfunctional" because their imposition threatened to "invert" the entire investigatory process by forcing the grand jury "to furnish answers to its questions before it could ask them." *Id.* at 214. The panel concluded that "[i]nasmuch as grand juries are subject to judicial control and subpoenas can be challenged by motions to quash, any further requirement that would saddle

a grand jury with preliminary showings to procure attendance would unnecessarily impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Id.* at 214-15. Rule 3.10, however, does precisely that which *McNabb* forbids. It mandates that before a grand jury subpoena may be served on an attorney, the district court must find, among other things, that the attorney's expected testimony or evidence is relevant to the grand jury's investigation and is not sought primarily for an improper purpose.

In *In re Grand Jury Matter (Backiel)*, 906 F.2d 78 (3d Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 509, 112 L.Ed.2d 521 (1990), the Third Circuit held that compelling the Government to show that the subpoenaed attorney is the only practical source of the information demanded by the grand jury—which Rule 3.10 explicitly imposes as a precondition to approval of service—and that there is a heightened need for the evidence—which is Rule 3.10's overall effect—would "obviously impair the efficiency of grand juries. Such a requirement would bring investigators to intermittent standstills as the government set out to prove the necessity of each piece of information it sought to obtain." *Id.* at 88 (quoting *In re Grand Jury Proceedings*, 862 F.2d 430, 431-32 (2d Cir. 1988)). The panel also noted that potential witnesses or sources of evidence would be less inclined to cooperate if they knew that either the information they impart or their identities might be disclosed by the Government in its effort to satisfy these additional requisites. *Id.*; *see Hughes*, 633 F.2d at 287. In explaining its disapprobation of the "no feasible alternative" criterion the Court stated, "The grand jury cannot be constrained to acquire only the minimum evidence necessary to secure an indictment and is free to pursue cumulative leads. . . . How much information is 'enough' is a matter for the judgment of the grand jurors and the prosecution rather than the court." *Backiel*, 906 F.2d at 88. *Accord In re Grand*

Jury Investigation (Tinari), 631 F.2d 17, 19-20 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083, 101 S.Ct. 869, 66 L.Ed.2d 808 (1981); *In re Grand Jury Empanelled May 7, 1987*, Misc. No. 87-165, 1989 WL 72260, slip op. (D.N.J. June 28, 1989); *Cf. United States v. Dionisio*, 410 U.S. 1, 15, 93 S.Ct. 764, 772, 35 L.Ed.2d 67 (1973) ("No grand jury witness is 'entitled to set limits to the investigation that the grand jury may conduct.' "). The reasons for this are not hard to divine. The judiciary is poorly equipped to anticipate with any precision what a subpoenaed attorney will say before he or she testifies, the relative importance of the evidence sought for the grand jury's consideration, or whether that information can be secured from a source other than the attorney, *Sinadinos*, 760 F.2d at 170, particularly if the reviewing court must labor to do so without the benefit of a factual record developed in an adversary setting. A concerted effort by the courts to inquire into these matters would cause substantial delays in the progress of criminal investigations. *Id.*; Weiner, *supra*, 23 Am.Crim.L.Rev. at 121. And, as one court has observed, the grand jury is not required to guess at its peril the exact moment when it has acquired a sufficient quantum of evidence to indict and therefore cease its investigation. *Sinadinos*, 760 F.2d at 170-71.

Every other Court of Appeals but one has declined to permit, as inconsistent with the mission of the grand jury or otherwise contrary to federal law, the application of conditions on subpoenas similar those imposed by Rule 3.10. For example, in *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir.) (in banc), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986), which the Third Circuit quoted with approval in *Backiel*, 906 F.2d at 87-88, the Second Circuit held that creating the "additional requirements that the government show its need for the information sought and that the attorney is the only source of that information" before a court may validate an attorney subpoena "would

hamper severely the investigative function of the grand jury, if not stop the grand jury 'dead in its tracks.'" 781 F.2d at 248. Supreme Court precedent, the Court of Appeals stated, has admonished against compelling the Government to tender "a preliminary showing of need, and unavailability of other sources" precisely because it risks an "unacceptable interruption" of the grand jury process. *Id.* at 248-49 (citing *Dionisio*, 410 U.S. at 17 n. 16, 93 S.Ct. at 773 n. 16). *Accord In re Grand Jury Matter*, 926 F.2d 348, 350 (4th Cir.1991); *In re Grand Jury Subpoena for Attorney Representing Reyes-Requena*, 913 F.2d 1118, 1127, 1129 (5th Cir.1990); *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 195-96 (10th Cir.1990); *In re Grand Jury Proceedings*, 862 F.2d at 431-32; *United States v. Perry*, 857 F.2d 1346, 1347-49 (9th Cir.1988); *In re Grand Jury Proceedings*, 791 F.2d 663, 665-66 (8th Cir.1986); *Matter of Klein*, 776 F.2d 628, 632-36 (7th Cir.1985); *Sinadinos*, 760 F.2d at 170-71; *In re Grand Jury Proceedings (Weiner)*, 754 F.2d 154, 156 (6th Cir.1985); *United States v. Morchower*, 718 F.2d 1093 (4th Cir.1983) (unpublished opinion summarized in *Doe*, 781 F.2d at 247 n. 4); *In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571, 1575 (11th Cir. 1983); *Walsh*, 623 F.2d at 492-93. The only opinion to the contrary in this respect, the equally divided in banc decision of the First Circuit in *Klubock*, is an orphan in the federal system, and it will not find a relative here.

Further, Rule 3.10 dramatically expands the scope of privilege protections for attorneys and their clients in defiance of the canon that the grand jury's right to evidence is substantively limited only by express constitutional, common law, or statutory privileges. *Branzburg v. Hayes*, 408 U.S. 665, 688, 707-08, 92 S.Ct. 2646, 2660, 2669-70, 33 L.Ed.2d 626 (1972); *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950); *Matter of Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373, 379, 382 (3d Cir. 1976). As Federal Rule of Evi-

dence 501 directs, "[T]he privileges of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The purpose of the attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law," *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981), is "to encourage clients to make full disclosure to their attorneys" so that they can render accurate legal counsel. *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976). Under the standard definition of the privilege, when legal advice of any kind is sought from a professional legal advisor in her capacity as such, the communications relating to that purpose made in confidence by the client are at his instance permanently protected from disclosure by himself or counsel, unless the protection has been waived. *United States v. Rockwell Int'l*, 897 F.2d 1255, 1264 (3d Cir. 1990).

In *Matter of Walsh*, 623 F.2d 489 (7th Cir.), *cert. denied*, 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980), the Seventh Circuit considered a district court ruling that had placed on the Government requirements virtually indistinguishable from those articulated in Rule 3.10. The district court had held that before an attorney could be compelled to appear before a grand jury, the Government must demonstrate that the information demanded by the subpoena is not insulated from disclosure by attorney-client privilege or the work product doctrine, that there is a particularized need for the testimony or documents sought, that no other source for the evidence is available, and that the information is material. *Id.* at 492. In reversing, the Court of Appeals declared this matrix of restrictions, which the district court had made "available to no other [class of] grand jury witness," constituted an impermissible constriction of the grand jury's authority and an undue expansion of the attorney-client privilege. *Id.* at 493. The Court wrote:

> No privilege, no matter how central to our system of justice, has been held to excuse the "obligation of every person to appear and give his evidence before the grand jury." Instead, the interest in preserving confidences and the interest in pursuing the public's right to "every man's evidence" are accommodated. To that end, the witness must take the stand and answer or refuse to answer individual questions. . . . [W]ere we to afford attorneys the right to refuse to appear before grand juries, we would be granting a protection far greater than the parameters of the [attorney-client] privilege.

Id. (quoting *United States v. Dionisio*, 410 U.S. at 9-10, 93 S.Ct. at 769). *Accord Reyes-Requena*, 913 F.2d at 1129 ("[J]udicial attempts to regulate attorney appearances before the grand jury would tend to create exemptions beyond matters of privilege and constitutional limitations and would transgress the command of *Branzburg.*"); *Klubock*, 832 F.2d at 669-70 (Levin, J., dissenting); *see Backiel*, 906 F.2d at 87-88; *Grand Jury Subpoena Served Upon Doe*, 781 F.2d at 249.

The *Walsh* Court's reasoning is in line with the overwhelming weight of authority that a witness who is subpoenaed to produce documents or testify cannot simply decline to do so altogether on the basis of privilege, but rather must assert the privilege document by document or in response to specific questions. *Rockwell Int'l*, 897 F.2d at 1265; *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1518 (11th Cir.) (citing multiple cases), *cert. denied sub nom. Hastings v. Godbold*, 477 U.S. 904, 106 S.Ct. 3273, 91 L.Ed.2d 563 (1986); *Klein*, 776 F.2d at 634-35; *United States v. First State Bank*, 691 F.2d 332, 335 (7th Cir. 1982). "Otherwise, a court would be forced to attempt to determine the existence, application, and scope of an asserted privilege in ignorance of the context in which it is alleged to apply." *Certain Complaints Under Investigation*, 783 F.2d at

1518. *Walsh*'s rejection of the district court's detailed guidelines for attorney subpoenas also is consistent with the precept that because the attorney-client privilege and the work product doctrine obstruct the search for truth and generate benefits that are, "at best, indirect and speculative," they must be "strictly confined within the narrowest possible limits consistent with the logic of [their] principle[s]." *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d at 1235. *Accord In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802-03 (3d Cir. 1979); *In re Grand Jury Investigation*, 557 F.Supp. 1053, 1055 (E.D.Pa. 1983).

Of more immediate concern, if the district courts have adopted Rule 3.10, then they have conferred on attorneys not only a protection that exceeds the bounds of recognized privileges, but also one that constitutes an almost impregnable immunity from ever testifying or producing documentary evidence regarding their clients. Rule 3.10 dictates that before a court may allow the service of a grand jury subpoena addressed to an attorney, it must find that the information sought "is not protected from disclosure by Rule 1.6" of Pennsylvania's Rules of Professional Conduct. Rule 1.6 is a confidentiality provision and states that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." There are exceptions to this broad ethical obligation. For instance, it does not extend to disclosures impliedly authorized in order to represent the client, or those necessary to prevent certain criminal or fraudulent acts or to comply with Rule 3.3, which requires that lawyers act with candor toward tribunals. Pa.Rules of Professional Conduct Rule 1.6(a)-(c)(2).

Although the duty to keep client information confidential and the attorney-client privilege stem from similar policy considerations, the former is substantially broader than the latter. *See, e.g.*, S. Gillers & N. Dorsen, Regulation of Lawyers 287-88 (1985); G. Hazard & S. Koniak,

The Law and Ethics of Lawyering, ch. 4 (1990); Subin, *supra*, 70 Iowa L.Rev. at 1112-13, 1145; Zacharias, *Rethinking Confidentiality*, 74 Iowa L.Rev. 351, 355 n. 18, 363 n. 55 (1989); *cf. Universal Athletic Sales Co.*, 546 F.2d at 539. In particular, while the attorney-client privilege extends only to confidences learned from the client, *Rockwell Int'l*, 897 F.2d at 1264; *In re Grand Jury Proceedings*, 791 F.2d at 665; 8 J. Wigmore, Evidence § 2317, at 618-19 (J. McNaughton rev. 1961), the ethical prohibition against disclosure generally applies no matter what the source of information about the client. The commentary to Rule 1.6 underscores this: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to *all information relating to the representation, whatever its source.* A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." (Emphasis added). Of course, the responsibility to safeguard client secrets is an important, time-honored one and is not in itself objectionable. Rule 3.10, however, converts the confidentiality rule into a legal mandate, that is, a privilege, because it requires the court to withhold altogether approval of a subpoena directed to an attorney if the information sought "relate[s] to representation of [the attorney's] client," unless the client consents after consultation or unless one of four exceptions is applicable. Apart from simply prohibiting the issuance or service of subpoenas directed to attorneys under all circumstances, it would be difficult indeed to invent another linguistic formulation that so grossly distorts current notions of evidentiary privilege and is so profoundly inimical to the traditional configuration of grand jury authority.

Even if one could harmonize the "new and expanded" attorney-client privilege created by Rule 3.10, *see Klubock*, 832 F.2d at 669-70 (Levin, J., dissenting), with the scope of the grand jury's powers, it is a modification that most

assuredly cannot be engineered by the local rule. Reasonable minds may disagree about the exact contours of district court rulemaking authority, but there is no question that the lower federal courts cannot alter or enhance privileges in that manner. *See* Fed.R.Evid. 501; Fed.R.Crim.P. 57 advisory comm. note (district courts permitted to regulate "details" of practice); *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635, 44 S.Ct. 220, 222, 68 L.Ed. 480 (1924) ("[N]o rule of court can . . . abrogate or modify the substantive law."); *In re Grand Jury Proceedings*, 558 F.Supp. 532 (W.D.Va. 1983) ("The grant of authority found in § 2071 allows courts to make 'rules of practice,' but not 'rules of law.'"); *cf. Burlington N.R. Co. v. Woods*, 480 U.S. 1, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987) (construing 28 U.S.C. § 2072). Even Federal Rules touching upon those matters are not valid without Congress's blessing. As 28 U.S.C. § 2074(b) clearly prescribes, "Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." *See* H.R.Rep. No. 422, 99th Cong., 1st Sess. 22, 23 (1985) ("[S]ection 2074(b) provides that evidentiary privileges are *substantive* in nature and may not be altered except by Act of Congress." (emphasis added)); Siegel, *Practice Commentary, reprinted in* 28 U.S.C.A. foll. § 2074 (1990 Supp.).

To be sure, the authority of the grand jury is not unlimited, and that body is expected to operate within the confines of the Constitution and federal law. *Butterworth v. Smith*, 494 U.S. 624, ——, 110 S.Ct. 1376, 1382, 108 L.Ed.2d 572 (1990); *Dionisio*, 410 U.S. at 11, 93 S.Ct. 764; *Branzburg*, 408 U.S. at 688, 707-08, 92 S.Ct. at 2660, 2669-70; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). But, as the caselaw unambiguously teaches, imposing Rule 3.10's specific requirements—that the information demanded by the grand jury subpoena must not be protected by Professional Conduct Rule 1.6, privilege, or the work product

doctrine, that the evidence must be relevant and sought for a permissible reason, and that the attorney must be the only source of the information—impairs far too harshly the Government's and the grand jury's vital interests in preserving secrecy, ensuring investigatory flexibility, and preventing procedural delays. Precedent further dictates the conclusion that Rule 3.10's pre-service judicial review mechanism itself, whether adversary or ex parte in character, at the least impermissibly trenches upon important interests in maintaining the grand jury's investigatory latitude and avoiding procedural interruptions.

Last, Rule 3.10 cannot be reconciled with Federal Rule of Criminal Procedure 17, which regulates subpoena practice. Subdivision (a) provides: "A subpoena shall be issued by the clerk under the seal of the court. . . . The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served." In contrast stand subdivisions (b), (c), (f), and (g). There, the drafters explicitly delineated the court's role in the subpoena process. Subdivision (c) empowers a court to "quash or modify" a subpoena duces tecum "if compliance would be unreasonable or oppressive." The court may entertain an application to quash or modify, however, only after the subpoena has been served and only "on motion." Under subdivision (g), the court may hold in contempt any individual who, "without adequate excuse," fails to obey a served subpoena. Judicial approval as a precondition to the issuance or service of a subpoena is set forth in only two instances. Subdivision (b) states that if a defendant makes a showing of financial distress and need for a specific witness, "[t]he court shall order at any time" that, without cost to the defendant, "a subpoena be issued for service on [the] named witness." Subdivision (f), in conjunction with Fed.R.Crim.P. 15, requires the entry of a court order before the clerk of court

can issue a subpoena directing the attendance of a witness at a deposition.

A previous incarnation of Fed.R.Civ.P. 45, the civil analogue to Fed.R.Crim.P. 17, contained a screening requirement similar to the one erected by Rule 3.10. Prior to 1946, subdivision (d)(1) necessitated judicial approval for the issuance of subpoenas commanding the production of documentary evidence at depositions. *See* Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, *reprinted in* 1946 U.S. Code Cong. & Admin.News 2313, 2349. That provision was stricken, however, as needlessly burdensome and duplicative of other safeguards. As the Advisory Committee stated at the time, the precondition of court approval

> is unnecessary and oppressive on both counsel and court, and it has been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45(a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30(b) or Rule 45(b).

Id. Accord Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, *reprinted in* 1946 U.S.Code Cong. & Admin.News 2387, 2397.

Rule 17(a), of course, makes no allowance for judicial involvement in the issuance and service of subpoenas. Courts have acknowledged this on many occasions, *see United States v. Miller*, 425 U.S. 435, 446 n. 8, 96 S.Ct. 1619. 1625 n. 8, 48 L.Ed.2d 71 (1976) (comparing subpoenas with search warrants by noting that, unlike the latter, subpoenas are not subject to prior judicial ap-

proval); *United States v. Nelson*, 852 F.2d 706, 710 (3d Cir.) (noting that under Fed.R.Crim.P. 17(a) "subpoenas are issued without meaningful judicial oversight"), *cert. denied*, 488 U.S. 909, 109 S.Ct. 262, 102 L.Ed.2d 250 (1988); *Martino*, 825 F.2d at 761 ("[A]lthough grand jury subpoenas are issued in the name of the district court over the signature of the clerk, 'they are issued pro-forma and in blank to anyone requesting them.' . . . It is evident that no judge issue[s] the grand jury subpoena since there is no place for a judge's signature." (quoting *Schofield I*, 486 F.2d at 90)); *id.* at 761 n. 4 ("[T]he court's actual involvement with the issuance of a grand jury subpoena is limited to issuing a blank subpoena bearing the seal of the court."); *DiGenova*, 779 F.2d at 80 ("While a federal grand jury subpoena is issued under the authority of a court, the court has no substantive involvement in a particular subpoena *unless* the subpoenaed party challenges it." (emphasis added)); *In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir.1984); *Schofield I*, 486 F.2d at 90 (stating the "court exercises no prior control whatsoever" upon the use of subpoenas), and, in fact, part of the rationale supporting the *Schofield* affidavit requirement is the judiciary's utter lack of control over the grand jury subpoena process until an action to enforce or motion to quash is filed. *Schofield I*, 486 F.2d at 90, 92. That pre-service judicial screening is expressly authorized in subdivisions (b) and (f) of Rule 17 further suggests that it is not permissible as a general proposition. These principles, in conjunction with the drafter's rejection of pre-issuance judicial approval under Rule 45 and the great latitude afforded grand jury investigations, militate toward the conclusion that silence regarding court intervention cannot be construed as an invitation to assign judges new functions in the grand subpoena process. *Cf. Miner v. Atlass*, 363 U.S. at 651-52, 80 S.Ct. at 1306-07; Sheridan, *supra*, 2 Geo. J. Legal Ethics at 508-09. Indeed, one reason undergirding the revision of Rule 45 is equally applicable to Rule 17. In-

dividuals to whom subpoenas duces tecum are directed may seek judicial relief by way of a motion to quash.

The Disciplinary Board posits that because some courts, even though Rule 17 does not give authority them to, have considered motions to quash subpoenas ad testificandum. Rule 17 cannot be read to harbor prohibitions against the expansion of judicial authority in this area. *See United States v. Klubock*, 639 F.Supp. 117, 123 (D.Mass.1986), *aff'd by equally divided court*, 832 F.2d 664, 668 (1st Cir.1987) (in banc). This contention is flawed. First, the view that subpoenas ordering an individual to testify may be quashed is contrary to the weight of opinion, and, for reasons previously discussed, is not the superior practice. *See supra* at 341-42; 344; 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 273, at 149 & n. 13 (1982 & 1990 Supp.). Second, Rule 17(c) allows courts to quash improper subpoenas duces tecum, but Rule 17(a) unquestionably does not provide for pre-service judicial screening. There is surely a difference between enlarging the ambit of a power already explicitly conferred and creating a new power altogether out of a source that does not even arguably bestow it. Last, the Disciplinary Board's assertion, if sound, simply broadens its dilemma. Because Rule 3.10 cannot nullify the procedure to quash subpoenas under Fed.R.Crim.P. 17, then all subpoenas, not just subpoenas duces tecum, may be twice reviewed by courts before the grand jury is allowed to secure the evidence it seeks. As a result, the investigative process would be subject to even more prevalent delays and disruptions. *See supra* 340 & n. 3.

In any event, Rule 3.10 runs afoul with Rule 17 in another manner considered neither by the *Klubock* court nor the defendant. A presumption of regularity attaches to grand jury subpoenas "issued through normal channels." *R. Enterprises*, —— U.S. at ——, 111 S.Ct. at 728. That presumption, which is expressed in the language of Rule 17, "generally may be dispelled only upon particu-

larized proof of irregularities in the grand jury process." *Id.* (quoting *United States v. Mechanik*, 475 U.S. 66, 75, 106 S.Ct. 938, 944, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring in judgment)). *Accord Appeal of District Council 33*, 770 F.2d at 40 ("Grand jury proceedings are entitled to 'a presumption of regularity.' Thus, the party objecting to the enforcement of a grand jury subpoena has the burden of demonstrating some irregularity in those proceedings." (citations omitted)); *Schofield I*, 486 F.2d at 92. In its language and tenor, Rule 3.10 presupposes the opposite. The Rule forbids the service of a grand jury subpoena upon an attorney "unless" the court grants its approval, which in turn must "normally be withheld unless" the court, after a hearing, is able to find affirmatively that certain conditions have been satisfied. No "particularized proof of irregularities" is needed to occasion scrutiny of the subpoena. Instead, review is triggered by the bare fact that a prosecutor desires to serve a grand jury subpoena on a lawyer to secure evidence about the attorney's client. Inquiry into the propriety of the subpoena is required in every instance in which that combination of circumstances arises, without any action by the lawyer to whom the subpoena is addressed. This provision of automatic review conflicts with the plain terms of Rule 17, which allows a person to avoid compliance with a grand jury subpoena "*only* 'on motion'" and only if he or she demonstrates that compliance would be unreasonable within the meaning of Rule 17(c). *R. Enterprises*, —— U.S. at ——, 111 S.Ct. at 728 (emphasis added). That the individual commanded to produce evidence is a lawyer does not alter the Rule's operation. *In re Grand Jury Matter*, 926 F.2d at 350 ("Attorneys, like all others, have 'the initial task of demonstrating . . . some valid objection to compliance.'" (quoting *R. Enterprises*, —— U.S. at ——, 111 S.Ct. at 730 (Stevens, J., concurring))).

B.

Because the district courts implicitly have rejected the importation of Rule 3.10 into their local rules and because Rule 3.10 offends federal law, a state entity such as the Disciplinary Board cannot initiate disciplinary proceedings against federal prosecutors who fail to obtain prior judicial authorization for grand jury subpoenas when they are practicing in those courts. *See Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963); *Silverman v. State Bar of Texas*, 405 F.2d 410, 413-415 (5th Cir.1968), *on remand*, 303 F.Supp. 486 (W.D.Tex. 1969); *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1407, 1414-15 (E.D.N.Y.1989). It cannot be doubted that states have a constitutionally permissible and legitimate interest in regulating attorneys admitted to their bars and in overseeing the practice of law within their borders. *In re Griffiths*, 413 U.S. 717, 723, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910 (1973); *Sperry*, 373 U.S. at 383, 83 S.Ct. at 1325; *Lowrie v. Goldenhersh*, 716 F.2d 401, 408 (7th Cir.1983). Nevertheless, under the supremacy clause of the Constitution, state laws, including disciplinary rules, "though enacted in the exercise of powers not controverted," must yield when found incompatible with federal law. *Sperry*, 373 U.S. at 384, 83 S.Ct. at 1325. *Accord Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Local rules, no less than Federal Rules or Acts of Congress, are part of the supreme law of the land. *See United States v. Hvass*, 355 U.S. 570, 78 S.Ct. 501, 2 L.Ed.2d 496 (1958); *Weil v. Neary*, 278 U.S. 160, 49 S.Ct. 144, 73 L.Ed. 243 (1929); *Klubock*, 832 F.2d at 651.

There is a conflict between federal and state law when compliance with the regulations of both sovereigns is a "physical impossibility" or when the state enactment is

"an obstacle to the accomplishment and execution of the full purposes ond objectives" of federal legislation. *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). *Accord Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Government attorneys operating in the district courts of Pennsylvania obviously cannot request and obtain federal judicial approval for grand jury subpoenas in conformity with Rule 3.10 and simultaneously refrain from doing so in order to comply with federal dictates. State enforcement of Rule 3.10 against attorneys for their conduct in the district courts also would countermand national objectives by requiring them to act in manner which, as explained earlier at length, would frustrate the expeditious and just administration of the federal criminal laws.

IV.

The Court is not oblivious to the concerns that supplied the impetus to Rule 3.10's creation. The wisdom of the Rule, however, is not at issue here. The state is of course free to fashion its own procedures so long as it does not transgress applicable constitutional values. But interposing the strictures of Rule 3.10 into the federal sphere is another matter entirely. The Rule cannot be fairly understood to have been integrated into the local rules of the district courts. It distorts evidentiary privileges, disrupts existing subpoena practice, and compromises the authority and function of the modern grand jury. In consequence, Rule 3.10 is without vitality in the district courts of Pennsylvania, and the state may not sanction prosecutors who fail to adhere to it when they are working in those fora.

An order and declaration follow.

ORDER

AND NOW, this 22d day of April, 1991, for the reasons set forth in this Court's Memorandum dated April 22, 1991;

IT IS ORDERED that Defendant's Motion for Summary Judgment is DENIED;

AND IT IS FURTHER ORDERED that Plaintiffs' motion for Summary Judgment is GRANTED and that, pursuant to Federal Rule of Civil Procedure 56, judgment is ENTERED in favor of Plaintiffs and against Defendant;

AND IT IS DECLARED that the United States District Courts for the Western, Middle, and Eastern Districts of Pennsylvania have not adopted Pennsylvania Rule of Professional Conduct 3.10 and that Rule 3.10 is in conflict with federal law;

AND IT IS FURTHER DECLARED that, in accordance with the supremacy clause of the United States Constitution, Defendant Disciplinary Board of the Supreme Court of Pennsylvania, its officers, agents, servants, employees, and attorneys therefore shall not initiate disciplinary proceedings against or sanction any prosecutor or other government attorney on the ground that the prosecutor or other government attorney, when practicing before the United States District Court for the Western, Middle, or Eastern District of Pennsylvania, had subpoenaed an attorney, without prior judicial approval, to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer sought to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.